

1 SEYFARTH SHAW LLP
 2 Brian P. Long (SBN 232746)
 bplong@seyfarth.com
 3 601 South Figueroa Street, Suite 3300
 Los Angeles, California 90017-5793
 4 Telephone: (213) 270-9600
 Facsimile: (213) 270-9601

5
 6 Andrew L. Scroggins
 (admission pro hac vice)
 7 ascroggins@seyfarth.com
 8 233 South Wacker Drive, Suite 8000
 Chicago, Illinois 60606-6448
 Telephone: (312) 460-5000
 9 Facsimile: (312) 460-7000

10 Attorneys for Defendant
 11 TEKSYSTEMS, INC.

12
 13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15
 16 BO AVERY, PHOEBE RODGERS, KRISTY) Case No. 3:22-cv-02733-JSC
 CAMILLERI, AND JILL UNVERFERTH,)
 17 individually, on behalf of themselves and on) **CLASS ACTION**
 behalf of all others similarly situated,)
 18 Plaintiff,) **DEFENDANT'S OPPOSITION TO**
) **PLAINTIFFS' MOTION FOR CLASS**
) **CERTIFICATION**
 19 v.)
 20 TEKSYSTEMS, INC.,) Date: December 21, 2023
) Time: 10:00 a.m.
 21) Ctrm.: 8 – 19th Floor
 22 Defendant.) Judge: Hon. Jacqueline Scott Corley
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1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Plaintiffs Bo Avery, Phoebe Rodgers, Kristy Camilleri, and Jill Unverferth move to certify a
 3 class of more than 500 individuals who have worked for TEKsystems, Inc. (“TEK”) in California as
 4 Recruiters (“Recruiters”) since January 28, 2018, on the grounds that these Recruiters have been
 5 misclassified as exempt employees. But misclassification cases are inherently unsuitable for class
 6 treatment because the analysis depends on what a particular employee *actually does*—the work
 7 performed, the time spent, and the level of discretion and judgment exercised—and the reasonable
 8 expectations of the employer. Given the California Supreme Court’s decision in *Harris v. Superior*
 9 *Court*, 53 Cal. 4th 170 (2011), this is particularly true for cases involving the application of the
 10 administrative exemption.

11 In their motion, however, Plaintiffs argue that all putative class members are “entry-level
 12 Recruiters” and perform uniform “mundane” tasks and that they only “work in a producing role.” To
 13 support this claim, Plaintiffs offer their own testimony and that of seven select declarants, none of whom
 14 are current employees and only two of whom have worked for TEK in the past year and a half. As told
 15 by Plaintiffs and their declarants, Recruiters robotically relied on checklists as well as “search and match
 16 technology” to fill open job positions and never used their discretion or judgment regarding who to
 17 submit for an open position. Plaintiffs and their declarants also testify that they never had any role in
 18 interacting with TEK’s customers or evaluating whether candidates are a good fit for a particular role,
 19 always deferring to others in the role of Account Manager. Plaintiffs and their declarants liken their
 20 work to that of a personnel clerk.

21 TEK disputes this testimony, but even if their testimony were true, it is not consistent with that
 22 of other putative class members. Critically, even accepting the seven handpicked Plaintiffs’ declarants’
 23 statements at face value, the experiences of putative class members are quite different. Recruiters
 24 regularly use their discretion and judgment to source, screen, evaluate, negotiate with, and place
 25 candidates on assignment with TEK’s customers. Recruiters frequently interact directly with TEK’s
 26 customers, including helping to craft the requirements a customer may identify to be well suited to fill a
 27 desired position. Recruiters spend the majority of their time working on these significant placements
 28 and maintaining a network of highly qualified individuals who may be excellent matches to future job

1 opportunities. Further, many Recruiters testify this is all done with little supervision or oversight.

2 Perhaps realizing this, Plaintiffs also assert that Recruiters are merely production employees, and
 3 that their work is of little significance to TEK, other than to produce TEK's "market offering."
 4 Plaintiffs are mistaken here as well. As a matter of fact, the Recruiting services that putative class
 5 members perform unquestionably involve "matters of significance" not only for TEK, but also for
 6 TEK's **customers**. Further, as a matter of law, the administrative/production dichotomy that Plaintiffs
 7 advocate, relying upon an **unpublished** California Court of Appeal decision, has been **expressly**
 8 **rejected by the California Supreme Court**. When, as it must, this Court looks to the regulations
 9 regarding the administrative exemption as a whole, it is plain that there is no support for Plaintiffs'
 10 position and Plaintiffs' motion for class certification should be denied.

11 This same inevitable conclusion was reached in *DeLodder v. Aerotek, Inc.*, No. 08 Civ. 06044,
 12 2010 WL 11506881, at *1 (C.D. Cal. Aug. 16, 2010), aff'd, 471 F. App'x 804 (9th Cir. 2012). As
 13 Plaintiffs readily concede, *DeLodder* declined to certify a class of recruiters who alleged their employer,
 14 Aerotek, misclassified them. *Id.* The reasoning in the *DeLodder* opinion is even more strongly
 15 supportive here in support of denying class certification. TEK's Recruiters demonstrate great variety in
 16 the duties they perform, the methods they use to perform those duties, the discretion and judgment they
 17 exercise, and the supervision to which they are subjected. There are simply no common facts or theories
 18 that can lead to the resolution of Plaintiffs' claims and certification must be denied.

19 **II. RELEVANT FACTS**

20 **A. TEK's Business and the Role of the Putative Class Members**

21 TEK is a global business and technology firm that assists its customers in achieving their
 22 business transformation, customer experience, and business goals.¹ IT talent services are the core of
 23 TEK's business, and they involve staff augmentation, which means placing workers with specific skills
 24 on assignment at customer companies for a certain period of time. Capacity solutions are another type
 25 of service that TEK offers. This involves assembling teams of workers for customers who need a larger
 26 or more specialized workforce for a project. For example, TEK might provide a team of developers,
 27 testers and project managers for a customer who wants to upgrade their software system. Total

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¹ Haycock Dep. p. 134:6-13

1 management services are the most advanced and comprehensive type of service that TEK offers. Total
 2 management involves outsourcing and managing an entire IT function or outcome for a customer. For
 3 example, TEK might build and maintain a website for a customer who does not have the internal
 4 resources or expertise to do so.²

5 At the heart of each of these functions is the Recruiter. Recruiters start from the client's
 6 requirements for each of the business purposes outlined above, which can be complex and varied, and
 7 find and validate the qualifications of the best suited candidates to perform the work. At its core,
 8 Recruiters function to locate the absolute best talent in the demanding IT marketplace and match those
 9 professionals to important roles that serve a variety of purposes for TEK's customers.³

10 **B. The Named Plaintiffs And Their Declarants Worked For Limited Periods Of Time
 11 And Their Training Duration Was Not Typical**

12 Among the four named Plaintiffs, none worked following the onset of COVID in-person work
 13 restrictions in late March 2020, which brought on or accelerated a number of changes at TEK: Plaintiff
 14 Unverferth's employment with TEK ended on January 1, 2020; Plaintiff Avery's employment ended on
 15 April 27, 2019; Plaintiff Rodgers' employment ended on March 4, 2020; and Plaintiff Camilleri's
 16 employment ended on July 30, 2019. None of the Plaintiffs have worked for TEK in more than three
 17 and a half years, which is nearly two-thirds of the class period.⁴ Plaintiffs' limited tenure, and the long
 18 gap of time between the end of their employment by TEK and the current day, confirm that Plaintiffs
 19 have little evidence on how Recruiters perform their job duties, including over the last several years.

20 Plaintiffs' declarants do not fill in this gap and simply are not representative of the putative class
 21 they seek to represent. Not a single declarant is a current employee. In fact, only two of the declarants –
 22 Adam Topp and Brian Larsen – worked following the onset of COVID, though neither has been
 23 employed by TEK within the last year.⁵ Plaintiffs' declarants also differentiate themselves from the
 24 putative class based on short tenure: Adam Topp was classified and worked as a Recruiter for a total of
 25 3.5 months; Jessica Doerner for five months in 2019; Michael Tillson worked as a recruiter for seven

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 27 ² Haycock Dep. p. 73:16-77:7

³ Haycock Dep. p. 25:1-27:10, 60:22-61:16

⁴ Avery Dep. p. 53:2-54:14, 58:2-24, Ex 8, Ex 12; Camilleri Dep. p. 21:4-6, 22:4-18, 33:15-35:1, Ex. 7,
 9; Underferth Dep. p. 38:17-40:13, Ex. 7; Rodgers Dep. p. 11:23-12:24, 86:3-6.

⁵ Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 3, 6, 8; Doc. 64-1 (Ex. 19) Larsen Decl. ¶ 3, 6, 8.

1 and a half months; Brian Larsen for slightly less than a year.⁶

2 Importantly, Plaintiffs and their limited number of declarants are also atypical in how long they
 3 worked in the Recruiter Trainee role prior to assuming the role of an exempt recruiter. Recruiter Trainee
 4 training lasts for 13 weeks, but elevation to the exempt Recruiter role also requires satisfying certain
 5 performance benchmarks to demonstrate the capability to be a Recruiter.⁷ Plaintiff Bo Avery was a
 6 Recruiter Trainee for more than fourteen months; Jill Camilleri was a Recruiter Trainee for a little more
 7 than a year; Jill Unverferth was a Recruiter Trainee for more than eight months; and Phoebe Rodgers
 8 was a Recruiter Trainee for more than seven months. Among Plaintiffs' declarants, Michael Tillson was
 9 a Recruiter Trainee for thirteen months; Jessica Doerner was a Recruiter Trainee for a little more than a
 10 year; Jessica Decain was a Recruiter Trainee for eight and a half months; Jovon Cunningham was a
 11 Recruiter Trainee for seven months; and Adam Brissey was a Recruiter Trainee for seven months.⁸ In
 12 short, the time taken by Plaintiffs and their declarants to be placed in the exempt role of Recruiter was
 13 atypically long, suggesting that they themselves are not typical of the other Recruiters they seek to
 14 represent.

15 **C. TEK's Recruiter Declarants Span The Entire Relevant Period, Specialize In
 16 Different Areas, And Exercise Discretion In The Performance Of Their Job Duties**

17 In contrast to the Plaintiffs and their declarants, who describe their job duties in bland and
 18 uniform ways, other Recruiters in the putative class have deep knowledge and skill in recruiting, which
 19 they apply in unique ways in order to provide TEK's clients with talented, highly-paid IT professionals
 20 to work on important projects.⁹ These Recruiters include:

21 • Lindzy McCarty, an exempt Recruiter from July 2020 to the present, did not go through
 22 the Recruiter Trainee training program. Eighty percent of her work is with one TEK customer, where
 23 she has ingrained relationships, and she often presents her chosen candidates directly to them. (Ex. 8.)

24
 25 ⁶ Doc. 64-1 (Ex. 16) Dorner Decl. ¶¶ 3, 6, 8; Doc. 64-1 (Ex. 18) Tillison Decl. ¶¶ 3, 6, 8; Doc. 64-1 (Ex.
 26 17) Larsen Decl. ¶¶ 3, 6, 8; Doc. 64-1 (Ex. 19) Larsen Decl. ¶¶ 3, 6, 8.
 27 ⁷ Haycock Dep. p. 104:20-105:6.

⁸ Doc. 64-1 (Ex. 16) Dorner Decl. ¶¶ 3, 6, 8; Doc. 64-1 (Ex. 18) Tillison Decl. ¶¶ 3, 6, 8; Doc. 64-1 (Ex.
 28 17) Larsen Decl. ¶¶ 3, 6, 8; Doc. 64-1 (Ex. 19) Larsen Decl. ¶¶ 3, 6, 8; Avery Dep. p. 53:2-54:14, 58:2-
 24, Ex 8, Ex 12; Camilleri Dep. p. 21:4-6, 22:4-18, 33:15-35:1, Ex. 7, 9; Underferth Dep. p. 38:17-
 40:13, Ex. 7; Rodgers Dep. p. 11:23-12:24, 86:3-6.

⁹ TEK's Witness Declarations are Exhibits 3-16 to the Declaration of Brian P. Long submitted with this
 Response.

1 • Richelle Rothermich, an exempt Recruiter since July 2021, had 20 years of experience at
 2 creative agencies when she joined TEK and completed training in three months. Ms. Rothermich
 3 specializes in recruiting for product design roles. She sources from her personal network and does not
 4 use TEK's Connected database or make cold calls. She evaluates a candidate's portfolio of creative
 5 work against the customer's visual aesthetic, and she speaks directly with customers,. (Ex. 4.)

6 • Nicole Whitman, an exempt Recruiter from November 2013 – February 2014, is part of a
 7 specialized national team that recruits people knowledgeable in the installation and upgrade of electronic
 8 health record software for healthcare systems. Ms. Whitman's knowledge allows her to make judgments
 9 about candidates tailored to the customer project and how much experience the the role requires.
 10 Account Managers follow her recommendations most of the time. (Ex. 6.)

11 • Yasmine Yancey, an exempt Recruiter since March 2021, specializes in government
 12 service roles, which have unique characteristics that can make it more challenging to find qualified
 13 candidates. She speaks directly with customers, creates her own sourcing strategy centered around her
 14 personal network, and probes far past a candidate's resume to assess their skills. (Ex. 9.)

15 • Berenice Mendez, an exempt Recruiter from September 2021 – December 2022,
 16 specializes in placing software development engineers at tech companies. She sources candidates
 17 through her extensive personal network, has developed her own list of screening questions, and partners
 18 with Account Managers who rely solely on her recommendations. (Ex. 7.)

19 • Alana Levine-Gorelick, an exempt Recruiter from April 2018 – October 2019, specializes
 20 in placing software developers, project managers, and analysts. She chooses which reqs to which on,
 21 devises her own sourcing strategy, and regularly works directly with TEK's customers. (Ex. 11.)

22 • Nicole Guffy, an exempt Recruiter from December 2016 – January 2019, specializes in
 23 technology enablement, i.e., the use of technology to make new things possible. She believes "there are
 24 almost a millions ways" to source talent. She has direct contact with clients, starts negotiating with
 25 during their first or second call, and delivers performance management messages. (Ex. 3.)

26 • Alex Ferrari, an exempt Recruiter from December 2019 to the present, is part of a
 27 national team also focused on technology enablement. She works particularly closely with one TEK
 28 client. Through this repeated work, she is integrated with the client and has direct contact with hiring

1 managers up to the Director level, sharing her expertise about the labor market. (Ex. 15.)

2 • Paul Stryker, an exempt Recruiter from July 2017 – January 2018, specializes in
 3 recruiting those with design skill sets, like motion graphics designers and creative directors. Account
 4 Managers come to Mr. Stryker for his expertise, and he works with the same clients repeatedly, which
 5 gives him insight into their business. (Ex. 5.)

6 • Cristen Kehl, an exempt Recruiter from November 2016 – March 2020, first specialized
 7 in the applications industry vertical and primarily supported one customer, then switched to the digital
 8 and creative specialty supporting different clients. She sources candidates through channels like Slack,
 9 meetup.com, LinkedIn, and Connected, and believes no one at TEK cares what source she uses. She
 10 does not rely on what candidates say in their resumes, and has her own approach to validating the skills
 11 possessed by candidates. (Ex. 14.)

12 • Forest Compton, an exempt Recruiter from August 2019 – September 2021, specializes
 13 in recruiting software developers, including on customer projects like modernizing a financial services
 14 firm’s trading platform for clients. He partners with Account Managers, such as joining initial calls with
 15 customers where he helps to gather more detailed requirements for roles TEK has been asked to fill, and
 16 to present candidates to the customer. (Ex. 10.)

17 • Brandon Harvey, an exempt Recruiter since September 2021, specializes in Microsoft’s
 18 .NET technology. He conducts independent research into his client’s projects before he begins
 19 recruiting. He starts sourcing from his own network and their referrals and only turns to Connected if his
 20 other sources have not turned up enough candidates. He has created his own set of questions that he asks
 21 candidates during interviews in order to judge their technical capabilities. (Ex. 12.)

22 • Jessica Budde, an exempt Recruiter since June 2020, specializes in finding and placing
 23 software engineers for a specific TEK customer. She also can choose to work on job requisitions for
 24 different customers. She regularly has direct contact with TEK’s clients. Her candidate evaluations go
 25 beyond confirming that they possess the right technical skills, to assesses their professionalism,
 26 communication skills, ability to work on a team, and other factors. Account Managers almost always
 27 follow her recommendations about which candidates to submit. (Ex. 16.)

1 **D. TEK's Reasonable Performance Expectations**

2 Plaintiffs and their declarants go to lengths to describe what they contend TEK requires from
 3 Recruiters, including that they meet several performance metrics. What Plaintiffs and their declarants
 4 do not address are TEK's expectations as to *how* those metrics are achieved. For example, TEK expects
 5 that Recruiters meet metrics around the number of candidates successfully placed on assignment, and
 6 the profitability ("spread") earned from those candidates. TEK also measures various activity metrics
 7 that it has determined to be correlated to success in placements on assignment, such as number of calls
 8 and outreaches to potential candidates. Recruiters are expected to use their knowledge, experience, and
 9 discretion and judgment when identifying, screening, and recruiting potential candidates for positions.
 10 The Recruiters are also expected to negotiate pay rates and other terms and conditions of employment
 11 with candidates as well as customers.¹⁰ The complexities of the Recruiters' job means that while TEK
 12 tracked metrics for Recruiters, it understood and expected variation on how Recruiters accomplished
 13 their jobs.¹¹ As TEK's Senior Vice President of Talent Delivery describes its expectations:

14 Their job [Recruiter] is to understand the customer, the customer's need, the customer's
 15 project, the outcomes that the customer is looking to achieve.

16 They need to understand the customer's environment, what type of culture do they have,
 17 and also understanding what are the skills necessary for them to be able to assist the
 18 customer in achieving the outcomes that they're looking for.

19 They also have to understand the nuances and details associated with the contractual
 20 arrangements associated with that particular customer. And at times we have multiple
 21 agreements with one customer, so they have to understand which agreement are we
 22 working under and what are the terms and conditions of that agreement. And ultimately
 23 they have to know what are the details of what they can offer a consultant associated with
 24 the hourly bill rate that we might be billing a customer as well as any parameters or
 25 necessary background investigations or screening that would be necessary for that
 26 particular customer.

27 And once they have all that information, they will then have to understand the skills,
 28 goals, and interests of the consultant to be able to make a very complex match between
 29 this person [who] has not only the skills, the technical skills, they have the level of
 30 experience associated with those skills.

31 At times maybe need to understand the industry, is this a banking and finance customer,
 32 and do they need to have banking and finance experience, and what does that mean. If
 33 they work for a bank, is that the same as working for an insurance company. Sometimes
 34 it doesn't matter; sometimes it does.

27 ¹⁰ Haycock Dep. p. 140:23-142:10

28 ¹¹ Haycock Dep. p. 156:1-157:11, 153:4-18 ("Because the complexity of recruiting has increased to the
 29 degree that we needed to have a customized solution that allowed for the nuances and differences
 30 between individual recruiters.")

1 And so for them, they have to manage all of these complexities associated with the
 2 assignment and the skills to be able to make a match to be able to associate that
 3 consultant, not waste a customer's time sending over people that are not qualified for that
 4 requirement, and ensuring that that customer ultimately is satisfied.

5 Because they placed the person. Then they maintain the person; meaning, they are getting
 6 feedback from the customer, providing that feedback to the consultant -- So if they're
 7 working on the customer's site, the customer may tell them, Hey, you know, they're
 8 doing great technically. They're not getting along with their coworkers. They need to do
 9 a better job. Hey, Johnny was late three times in the past month. You need to talk to
 10 Johnny about their punctuality relative to the assignment.

11 And then ultimately the recruiter is responsible for continuing to work with that
 12 consultant, because many of our assignments are six months, nine months, 12 months, 18
 13 months, whatever it is. But they are temporary in that nature, and in that case their
 14 responsibility is to help that person find another job once their current assignment comes
 15 to conclusion.¹²

16 Account Managers and Division Leads expect that Recruiters will use their own judgment and
 17 innovation to source appropriate candidates. Kelly Boland, a former Account Manager and now a
 18 Division Lead testifies:

19 A Recruiter's success in the position relies heavily on their own initiative and effort to
 20 develop successful ways to locate qualified candidates, deciding who are strong fits for
 21 the client requirements, and placing the candidates to work on specific positions. At
 22 TEK, Recruiters are the ones primarily responsible for finding quality candidates for
 23 positions provided by our clients, and they are considered the market experts in their area
 24 of specialization. To be valuable in their position, Recruiters are expected to continually
 25 be learning about current marketplace conditions in the tech industry, which is constantly
 26 changing. Recruiters use their knowledge of the marketplace to seek out candidates that
 27 best fit into positions that clients are seeking. Recruiters are responsible to find the best
 28 ways to develop this knowledge for themselves. . . Recruiters are expected to look
 29 beyond the skills listed on a candidate's resume and assess the candidate to make sure
 30 that the candidate has the necessary depth of knowledge in those skills, can apply their
 31 skills in the context relevant to the job requirements, and possesses the non-technical
 32 skills to succeed in the role. Recruiters have full responsibility to make their own
 33 assessment of the candidate's suitability based on all information available to them, and
 34 to make referrals to the Account Manager if they determine the candidate would be
 35 successful. . . The Account Manager depends on the Recruiter's judgment about
 36 candidates, since Recruiters typically best understand the technology involved, the talent
 37 market, and the strengths and weaknesses of the candidates.¹³

38 Further, TEK expects that Recruiters are interacting directly with clients: "Typically one to two
 39 Recruiters join on the call with the hiring manager and the Account Manager. Account Managers lean
 40 on Recruiters to ask questions and help make the requisition as detailed as possible, particularly as it
 41 relates to the technical needs of the role, since Recruiters have deeper technical and market expertise."
 42 Boland Decl. ¶ 9. Finally, TEK expects that Recruiters operate with little supervision: "Recruiters work

¹² Haycock Dep. p. 27:14-30:2

¹³ Boland Decl. ¶¶ 7-8, 12-14.

1 in partnership with Account Managers. Recruiters and Account Managers typically touch base at the
 2 beginning and the end of the day to discuss the status and challenges they are facing their efforts, but
 3 otherwise they work independently.” Boland Decl. ¶ 16.

4 **E. The Extent Discretion and Judgment Varies From Recruiter to Recruiter**

5 There are significant variations in the roles and duties of Recruiters based on the industry they
 6 support, the roles they typically recruit to fill, and the time period when they worked for TEK (the
 7 remote work that became commonplace in response to the COVID-19 pandemic changed many
 8 practices, as did business-driven changes to job duties). Additional differences include, among others,
 9 the level of interaction with a customer, personal strategies for finding candidates and deciding whether
 10 they are well-matched to a position, input on which candidates are presented to the customer for the job
 11 being fulfilled, preparing candidates to make the strongest presentation of their credentials to the hiring
 12 manager, and approach to negotiating pay and other terms and conditions of employment.

13 Moreover, there is significant variation regarding Recruiters’ reported exercise of independent
 14 discretion and judgment. Furthermore, the level of supervision of Recruiters varies, based on both the
 15 customer being served, the position being filled, and the supervisor involved.¹⁴ Finally, the impact of
 16 the Recruiters’ duties and decisions on TEK and its customers varies greatly. The jobs TEK Recruiters
 17 fill are for skilled and valuable IT employees, often earning \$90-\$120 per hour, working in roles that
 18 may range from working as one team member on a team of individuals performing IT support services
 19 for a customer to providing highly technical and mission critical IT skills that are necessary to creating,
 20 improving, or maintaining the customer’s core product.

21 **1. Factors influencing the use of independent judgment and discretion vary**

22 **a. Identifying and sourcing candidates**

23 Recruiters devise their own sourcing strategies to find candidates in ways that vary significantly.
 24 Plaintiffs’ declarants testify, in identical language, that they robotically searched Connected (a TEK
 25 internal database) or LinkedIn and looked for people whose resumes shared keywords with the
 26

27 ¹⁴ Plaintiffs and their declarants each assert that they worked under the supervision of Account
 28 Managers. However, many Recruiters have never been supervised by Account Managers, or only for
 limited periods of time, and have been supervised only by other Recruiters. Rothermich Decl. ¶ 11;
 McCarty Decl. ¶ 10.

1 requisition.¹⁵ Yet, many Recruiters testify that is simply not how they performed their jobs, nor was it
 2 the expectation that they do so. Indeed, it is suggested to Recruiter Trainees to start sourcing from
 3 people they already have relationships with, and people who those contacts may refer.¹⁶
 4 Ms. Rothermich testifies to a similar approach: “I do not find Connected to be a useful source for the
 5 kinds of roles that I am trying to fill, and I do not use it to search for candidates.” Ms. Rothermich has
 6 built up her own network of potential candidates over time. She keeps them in her network and cross-
 7 recruits them for different potential job openings based on what she believes is their design aesthetic and
 8 whether they would be a good fit for a particular opening. Rothermich Decl. ¶¶ 19-22. Mr. Stryker
 9 confirms that he sourced candidates while he was a Recruiter by building his own network of
 10 professionals. Stryker Decl. ¶¶ 17-20. Ms. Levine-Gorelick testifies that she has built up her network
 11 over a number of years, and views finding the right candidate as akin to a “treasure hunt.” Levine-
 12 Gorelick Decl. ¶ 15. Mr. Compton testifies that his “first source is always my personal network,
 13 followed by referrals from people in my network, then people who have worked with TEK in the past.
 14 My philosophy is to start where the strong relationships are.” Compton Decl. ¶ 17. Only after
 15 exhausting those sources does Mr. Compton turn to database searches. *Id.*

16 Those Recruiters who use Connected or LinkedIn do so in considered and strategic ways. For
 17 example, like those cited above, Ms. Whitman testifies that she has developed her own network of
 18 potential candidates to submit for open job requisitions. When she goes outside of her network, she
 19 primarily utilizes LinkedIn Recruiter, though she uses TEK’s internal Connected database occasionally.
 20 Whitman Decl. ¶¶ 8, 18. Importantly, Ms. Whitman builds her own searches, and she has developed
 21 those searches over years of working: “I created searches that would find the resumes of candidates who
 22 had the skills needed for the req.” *Id.* ¶ 8. Ms. Whitman also went beyond a candidate’s resume and
 23 validated the skills they possessed: “When I found candidates, I would call them to learn more about

24 ¹⁵ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 18 (“I followed TEKsystems’ procedures and searched
 25 employment databases, including TEKsystems’ internal database and LinkedIn Recruiter. When
 26 searching employment databases, TEKsystems instructed me to utilize the Requirement, including the
 27 “top three job skills,” and match it to candidates’ resumes. I then added candidates that might match the
 28 requirements of the job Requirement to a call list.”); Doc. 64-1 (Ex. 14) Cunningham Decl. ¶ 18 (exact
 same quote as Brissey); Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 17 (exact same quote as Brissey); Doc. 64-1
 (Ex. 16) Doerner Decl. ¶ 17 (exact same quote as Brissey); Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 17 (exact
 same quote as Brissey); Doc. 64-1 (Ex. 18) Tillson Decl. ¶ 17 (exact same quote as Brissey); Doc. 64-1
 (Ex. 19) Topp Decl. ¶ 18 (exact same quote as Brissey).

¹⁶ DiBenedetto, Dep. p. 201:14-205:2.

1 their skills and decide whether they were a close enough match to continue in the process. If so, I would
 2 schedule a longer interview to gather more in depth information and contact their references to learn
 3 more about their work history.” *Id.*

4 Bernice Mendez testifies that “I have to be creative and resourceful to locate good candidates for
 5 a position. I maintain an extensive network of hundreds of potential candidates to reach out to for
 6 positions, which is the most productive way to find candidates who will be successful in obtaining the
 7 position. I have to do more than just review a candidate’s resume to determine if the qualifications
 8 listed by the candidate match the requirements on the requisition. Once I find someone that has the base
 9 level qualifications for the position I am filling, I still have to interview them so I can assess them and
 10 determine if their actual skill set is a good fit for a particular role.” Mendez Decl. ¶ 13.¹⁷

11 **b. Recruiters do not uniformly use screening tools and checklists to**
 12 **determine how to perform each of their job duties**

13 Screening of candidates is highly variable, depending on each Recruiter’s own methodology.
 14 Plaintiffs’ declarants again contend that they did little screening beyond a surface identification of listed
 15 skills on a resume.¹⁸ TEK’s expectations are that screening demands much more than just matching

16
 17
 18 ¹⁷ See also; Guffy Decl. ¶¶ 10-11 (“When I am working on a requirement, I create my own strategy to
 19 source talent, and I expect other Recruiters to do the same. . . . What sets a good Recruiter apart when it
 20 comes to sourcing is the ability to be strategic and innovative about how they find talent. Search filters
 21 alone are not enough to find the best candidates. It is up to the Recruiter to interpret and use the details
 22 they find about candidates.”); Yancey Decl. ¶ 14 (“I use several different strategies to source candidates.
 23 Finding quality candidates is challenging for the positions I am trying to fill, so I take initiative to locate
 24 and connect with candidates through various creative means.”); Compton Decl. ¶ 17; Harvey Decl. ¶¶ 9-
 25 10; Kehl Decl. ¶ 10 (““I have the autonomy to choose how I source my job candidates – it’s my
 26 business. I have multiple resources to use for sourcing, and I choose one or a combination based on the
 27 skills that I am searching for. For example, sometimes I will create searches in databases like LinkedIn
 28 or a TEK internal database called Connected. Other times I may use Slack or another channel to network
 with people I already know. In the past, I have gone to meetups through meetup.com in order to meet
 candidates. No one at TEKsystems really cares what source, I use as long as I’m not wasting time and
 finding the right candidates.”); Ferrari Decl. ¶ 9 (“My strategy for sourcing candidates is to start with
 LinkedIn. I create Boolean search strings based on job titles, position, location, and other filters to find
 profiles of people who seem to have done well in similar roles. When I find them, I analyze their
 profiles carefully, then reach out by direct message or phone to ask if they can recommend anyone. If
 that approach does not turn up candidates, I will create new Boolean search strings in LinkedIn.”)

¹⁸ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 28 (“If a candidate’s listed skills matched the Requirement, I
 sent the candidate’s resume and information about the candidate to the Account Manager or Account
 Lead.”); Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 28 (exact same quote as Brissey); Doc. 64-1 (Ex. 17) Larsen
 Decl. ¶ 27 (exact same quote as Brissey); Doc. 64-1 (Ex. 19) Topp Decl. ¶ 28 (exact same quote as
 Brissey).

1 buzz words on a resume to a particular job requirement.¹⁹ Many recruiters testify to their individualized
 2 approaches, where identifying relevant skills was the very beginning of a screening inquiry. For
 3 example, Ms. Rothermich testified that she specializes in creative design. She places employees in roles
 4 that include visual design, motion graphics, and production design. Because the employees she places
 5 have a creative side, she reviews their portfolios as well as their personality to determine if the candidate
 6 would be a good fit for a particular customer. She testified that she does not use, nor is she expected to
 7 follow scripts or checklists with the candidates she recruits. The candidates she recruits all require
 8 different messaging that is tailored to them as well as the job position that she is trying to fill. She
 9 evaluates their portfolios from an aesthetic perspective and determines whether the “vibe” of the
 10 candidate’s work is a good fit for a particular customer. Rothermich Decl. ¶¶ 3-10. Mr. Stryker states
 11 that Recruiters check references, assess the technical prowess of a candidate. He states that it is much
 12 more than matching a resume to bullet points.” The Recruiter is evaluating team fit and cultural fit for a
 13 company. Stryker Decl. ¶ 20.

14 Mr. Compton testifies that when he identifies a potential candidate, he takes “additional steps to
 15 validate their credentials,” such as calling the candidate, asking probing questions about their skills and
 16 the projects they have worked on, contact professionals references who are familiar with the person’s
 17 work, and asking the candidate to complete a technical assessment. Compton ¶ 18.

18 Ms. Whitman testifies: “I evaluate the candidates to decide whether to move forward with them.
 19 It is not enough to find people with experience who have experience with Epic or Cerner software, for
 20 example. I make sure that they have experience with the specific modules (components) in the software
 21 that are relevant to the customer’s project, and I consider whether they have earned special credentials in
 22 any relevant areas. I also make judgements based on what I know about the client and the project. For
 23 example, if the requisition is for someone to maintain a system that is relatively straightforward, a less

24 ¹⁹ Haycock Dep. p. 40:7-41:4 (“The art of recruiting is all of the things that I was saying before. It’s not
 25 just do the buzz words match, because many buzz words match, and the person is absolutely positively
 26 not the right person for the role. Because they also know, because they’re IT professionals, that you
 27 have to have the right buzz words on your resume to get hits in search and match. It’s just a very
 common thing, because everybody understands if you have the right information in your resume, well,
 then it’s going to get me more or less opportunities based on how well I do that. So a recruiter has to be
 able to discern between this person has all the right buzz words and jargon and they can actually do the
 job. And it’s really difficult for technology. . . So there is also the process of the recruiter going through
 and understanding how is it that I’m going to be able to make the match between the client requirement
 and the actual person that we are considering for that role.”)

1 experienced candidate may satisfy the requirements. On the other hand, a project that is at the point of
 2 doing a complex integration between existing software and new components will usually demand
 3 someone with more experience and a track record of completing similar projects.” Whitman Decl. ¶ 20.

4 Bernice Mendez testifies: “Through my years of experience, I have developed a particular
 5 expertise with positions for software development engineers at tech companies. In order to ensure that I
 6 am successful at my job and can identify the best prospects for specific positions, I have developed
 7 specific technical knowledge so that I can understand and assess the qualifications of the front end
 8 engineers that I place. In my experience, front end engineers have their own language, including around
 9 Java script and React and Angular computing languages used in their work, and I have had to learn how
 10 to communicate in their language as well. . . . Based on my experiences with different clients, over time
 11 I have developed and compiled screening questions unique to each client to ensure I can locate the most
 12 qualified candidate for the position. I have to evaluate the candidate’s skill level and importantly
 13 determine if the candidate is a good fit for the specific client, since each client has different types of
 14 needs. I do this by, among other things, assessing the candidate’s communications skills, how they
 15 respond to various social cues, and their overall personality, as well as probing their skill level with
 16 specific tech tools and their knowledge of certain technologies.” Mendez Decl. ¶¶ 9, 14.²⁰

17 ²⁰ See also Guffy Decl. ¶ 12; McCarty Decl. ¶ 15 (“A Recruiter should not just hand an Account
 18 Manager a candidate resume because it includes the top skills in the job requirement. In my view, every
 19 candidate a Recruiter brings to an Account Manager is a reflection of the Recruiter’s personal brand. If
 20 the Recruiter has not done a thorough screening, it is going to reflect poorly on the Recruiter if it does
 21 not work out.”); Yancey Decl. ¶ 17, 18 (“When I interview candidates, I weigh a variety of factors to
 22 determine if they are the best fit for a position. I analyze their presentation skills and their technical
 23 knowledge. It is also important that I determine if the candidate is a good cultural fit for the specific
 24 position, and evaluate their desire to work in the office or remotely, their willingness to travel, and their
 25 flexibility with the pay rate. I may gauge issues such as whether they can handle a micro-manager or
 26 would need to work with a more hands off manager, as well as if they could be the only IT person in a
 27 small office and be willing to work overtime as needed. . . I need to do more than just review the
 28 candidate’s resume to see if they would be qualified for the position. I need to assess how they handle a
 conversation, approach questions, and their overall attitude.”); Compton Decl. ¶ 18; Kehl Decl. ¶ 11 (“I
 and other Recruiters cannot just rely on what a candidate puts on their resume or posts on LinkedIn. I
 always talk to candidates and ask lots of questions to make sure that they have the skills that are listed
 on their resumes, that they have the necessary depth of knowledge in those skills to be able to perform
 the job requirements. I also assess whether the candidate has the soft skills that might be needed for the
 role. For example, many of the job requirements that I work on need people who can work on teams, so
 I ask questions about other team projects they have worked on and evaluate their communication skills
 through our interactions on the phone and by email.”); Ferrari Decl. ¶ 11 (““After I find a potential
 candidate, the best way to decide if they are a good match is to talk to them and ask lots of questions. I
 asking probing questions to really understand the projects they have worked on and the skills they had to
 apply so I can understand the depth of their experience.”); Budde Decl. ¶ 18 (“My assessment of
 whether a candidate is a good match for a customer’s job requirements goes beyond just confirming that

1 A Recruiter's job duties related to screening are not and cannot be scripted. Ms. Levine-
 2 Gorelick testifies that when she was a Recruiter, she was never given a script. Instead she was given the
 3 information she needed to learn, but that there are "no rule books." In coaching other Recruiters on how
 4 to screen and prepare candidates, Ms. Levine-Gorelick testifies that "the job is what you make of it.
 5 Different people can have completely different ways of doing this job and still be successful in their own
 6 way." In selecting coaches who will work with Recruiters, she is focused on choosing Recruiters who
 7 are really good at the 'why.' They are people with their own style, not people who do it strictly by the
 8 book. Levine-Gorelick Decl. ¶¶ 4, 27.

9 **c. Engagement with customers varies**

10 Plaintiffs' declarants testify in nearly identical language that they very rarely if ever interacted
 11 with TEK's customers.²¹ Yet, again, many Recruiters testify to a different experience. Ms. Whitman
 12 testifies that she has focused on three to four customers, and as a result has come to know them well.
 13 That knowledge impacts who she would submit as a candidate and her assessment of whether a
 14 candidate is a good fit for a role. Ms. Whitman will even present her candidates directly to the
 15 customers, as her Account Managers are confident in her presenting directly to the customers. Whitman
 16 Decl. ¶¶ 9, 13-16, 24. Lindzy McCarty testifies that she works directly with the hiring teams at a
 17 Fortune 100 tech client and participates in calls with them. She states that it benefits her to join calls
 18 with the customers regarding their open roles. It helps her focus on what is important for the new open
 19 position. Similarly, when she joins calls with customers to receive feedback on submitted candidates, it
 20 allows her to give pushback on any hesitations that the customer may have with a particular candidate.
 21 McCarty Decl. ¶¶ 19-23. Ms. Levine-Gorelick testifies that she schedules calls with customer if they
 22 would like to discuss the open role. Also, she states that she has placed a lot of employees who are now

23 they have the right technical skills. Through my interactions with a candidate, I am also assessing their
 24 communication style, how they present themselves, whether they conduct themselves professionally,
 25 and whether they will be able to work well with others on the customer's project or team.")

26 ²¹ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 31 ("It was the Account Manager and Account Lead's job to
 27 communicate with the Hiring Managers at TEKsystems' clients. I never spoke to TEKsystems' clients
 28 without an Account Manager or Account Lead present."); Doc. 64-1 (Ex. 14) Cunningham Decl. ¶ 31
 ("As a Recruiter, I had little to no interaction with TEKsystems' clients. It was the Account Manager's
 job to communicate with the Hiring Managers at TEKsystems' clients."); Doc. 64-1 (Ex. 15) DeCair
 Decl. ¶ 31 (exact same quote as Cunningham); Doc. 64-1 (Ex. 16) Doerner Decl. ¶ 30 (exact same quote
 as Cunningham); Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 30 (exact same quote as Cunningham); Doc. 64-1
 (Ex. 18) Tillson Decl. ¶ 30 (exact same quote as Cunningham); Doc. 64-1 (Ex. 19) Topp Decl. ¶ 31
 (exact same quote as Cunningham).

1 hiring managers in their jobs, and she interacts with them directly when the Account Manager is
 2 unavailable, and even covered that aspect of an Account Manager's job when the Account Manager was
 3 on maternity leave. Levine-Gorelick Decl. ¶¶ 23-25

4 Bernice Mendez testifies: "Depending on the position, I sometimes get on a call with the Hiring
 5 Manager and the Account Manager to ask questions specific about the project so I can determine the
 6 needs of the position that are not evident on the requisition, such as the depth of knowledge required for
 7 the various technologies and how the teams work together at the company. I try to fully gauge what the
 8 client is looking for in a new requisition and one of the best ways to do that is by speaking with the
 9 Hiring Manager." Mendez Decl. ¶ 11. ²²

10 ²² *See also*; Guffy Decl. ¶ 16; Compton Decl. ¶ 15 ("I like to join the Account Manager for a call with
 11 the customer to gather the requirements for the position. One of the benefits of this is getting the
 12 opportunity to hear about the customer's business and get a better understanding. Another benefit is that
 13 I can ask questions and help put together a more detailed requirement. For example, if the requirement
 14 says that a developer will need to use certain software tools, I will ask questions about what will be the
 15 context for the developer to use the tools. With that information, I can have a more specific sourcing
 16 strategy and screen candidates to find people with the best matched skills."); Harvey Decl. ¶ 8 ("The
 17 reason I am involved in the call is because I am the market expert, and I can help assess what the client's
 18 needs are for the position. I listen and try to fully gauge what the client is looking for. During those
 19 calls I may suggest to the client's hiring manager changes to the requisition based on what I am hearing
 20 about their needs and what the market is currently for the skill set they are seeking."); Cristen Kehl Decl.
 21 ¶¶ 6, 7 ("One of the values that I bring to TEK's relationships with its clients is my understanding of the
 22 market and what clients want. It is common for me to join an Account Manager for their call with a
 23 client to gather the job requirement details, because I can speak with the client hiring manager about the
 24 technical skills the job requires, the relevant context to performing the role, and the market for people
 25 with the necessary skills, which is knowledge that TEK Account Managers do not have. . . I have
 26 contacted clients directly in my role as a Recruiter for other reasons and in other contexts as well.
 27 Sometimes I already know the client's hiring manager, so it is easier to communicate directly. Other
 28 times the Account Manager may ask me to contact the hiring manager directly, rather than explaining
 information to the Account Manager and expecting them to pass it along to the hiring manager. I have
 also stepped in to run the business when an Account Manager is out the office for some reason, like
 vacation or leave"); Ferrari Decl. ¶ 8, 19 ("I often joined his calls with hiring managers at a tech client to
 learn about the positions they needed to fill and the job requirements. I am the expert on the technical
 skillsets that TEK's clients are looking for, so I can ask questions that ensure the job requirement
 includes everything we need to fill the position. Recruiters add value to those conversations because
 Account Managers do not have expertise in the relevant labor market. I was the Recruiter who filled
 almost all of the requisitions that Dante got from that client. . . Because I focus very closely on specific
 clients, I am able to become very integrated with them. I have direct contact with hiring managers at the
 Manager and Director level. I join calls with the clients to share my expertise about the labor market,
 such as trends that I see in the skillsets that are available to be recruited, and advice on what billing rates
 are necessary to attract excellent candidates."); Budde Decl. ¶ 10, 14 ("At a high level, my job duties as
 a Recruiter are to work with TEK Account Managers and hiring managers at TEK's customers to define
 the requirements for open positions at the customer . . . At least one or two times a month, I will join an
 Account Manager on a call with a hiring manager at a TEK client. Account Managers include me on
 these calls because I have expertise in the labor market for technical jobs. When we meet with a
 customer's technical hiring manager, I can ask expert-level questions to identify specifically what skills
 the customer needs from a candidate in order to have a successful project. I sometimes join calls with a
 customer's hiring manager to present the credentials of specific candidates that I have identified[.]")

d. Negotiation with candidates varies

Plaintiffs and their declarants assert that they were unable to negotiate rates, benefits, or other compensation issues with candidates.²³ In contrast, many Recruiters' experience varied substantially from that. For example, Ms. Rothermich testifies that she is able to push back on requisitions drafted by Account Managers and argue for changes to the requisitions based on market conditions. Further, Ms. Rothermich discusses rates with candidates. If after hearing that a candidate is seeking a particular rate, but in her experience that rate will make the candidate uncompetitive for placement, she lets the candidate know. She further testifies that she will discuss and get agreement with a candidate not only on their hourly rate, but also whether they can agree to the role being a hybrid work environment, the length of the contract that they will be hired under, the amount of PTO, and other central employment terms before she ever submits a candidate for potential placement. Ms. Rothermich is negotiating these items, and including them in her placement presentation so that the items do not need to be negotiated later. Rothermich Decl. ¶ 15, 21-23.

Nikki Whitman, also in contrast to the declarations submitted by Plaintiffs, confirms that she negotiates with candidates based on her own judgment: “I ask candidates what they are targeting to earn. I also ask them, what pay rate is too low, so you would not even want me to call you even if I thought everything else is a great fit. Most people will share these numbers with me, which lets me know not only whether their goal falls within the range of a job, but also where in the range I can make an offer that is attractive to them without offering more than is necessary.” Whitman Decl. ¶ 22.²⁴

²³ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 33 (“When a client wanted to hire a candidate, I relayed the offer. I did not negotiate the terms of a candidate’s employment. Account Managers or Account Leads and TEKsystems’ clients determined the pay range and terms of the contract. If a candidate had a question or a counteroffer, I relayed that information to the Account Manager or Account Lead, who decided how to proceed.”); Doc. 64-1 (Ex. 14) Cunningham Decl. ¶ 33 (exact same quote as Brissey); Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 33 (exact same quote as Brissey); Doc. 64-1 (Ex. 16) Doerner Decl. ¶ 32 (exact same quote as Brissey); Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 32 (exact same quote as Brissey); Doc. 64-1 (Ex. 18) Tillson Decl. ¶ 32 (exact same quote as Brissey); Doc. 64-1 (Ex. 19) Topp Decl. ¶ 33 (exact same quote as Brissey).

²⁴ See also, Mendez Decl. ¶ 18 (“Sometimes I have to get creative to meet their compensation goals if the rate negotiated with the client will not meet the expectations of the candidate. If a candidate is given an offer and I know that the compensation will not meet the candidate’s expectation, I will collaborate with the Account Manager to determine if we can get flexibility from the client on the wages or if we can make internal adjustments on the compensation to the candidate. I know the market for people with the skills that clients are looking for, and I can provide information to clients about what they should expect to pay for certain people with the skill sets they need.”); Guffy Decl. ¶ 15; Yancey Decl. ¶ 21; Kehl Decl. ¶ 14 (“I and other Recruiters routinely negotiate the pay with a candidate. Most job requirements include a pay range, but it is my call to negotiate the final pay for the candidate within that

e. The engagement with candidates varies

The amount of interaction between Recruiters and candidates for placements varies substantially. While Plaintiffs and their declarants testify that they have little interaction with candidates other than to gauge their interest in accepting a role and conduct basic screening²⁵, others testify to detailed relationships. TEK has the expectation that “Recruiters are always managing” the consultants they place.²⁶ That is what Ms. Rothermich does. Ms. Rothermich testifies that the success of a candidate comes down to the number of conversations she has with them prior to a potential assignment, and the preparation she gives them. Ms. Rothermich will have a number of conversations with potential candidates regarding company culture and work environment before ever submitting them for assignment. Further, she will call their references and judge their credibility in comparison to what she has heard from the candidate, research the customer’s hiring manager and others who have interviewed in the past for the role, and then prepare the candidate for the potential interview. She even will make suggestions to the candidate on potential changes to their resume or even their design portfolios. Critically, Ms. Rothermich also will deliver performance feedback to candidates that she has placed. At times she has had to deliver negative feedback to candidates. She states “If someone needs a kick in the pants, I’ll give it to them.” For others, she continues to advocate for them and keep them in mind for future assignments. Rothermich Decl. ¶ 37. Lindzy McCarty also states that she has had to give negative feedback to candidates, and that doing so requires her to balance that task with potentially keeping the candidate with TEK if the job was simply not a good fit. McCarty Decl. ¶ 18. Ms. Levine-Gorelick frequently gives feedback to candidates, and that she has been involved, although not the final decision maker, in taking someone off of an assignment. Levine-Gorelick Decl. ¶¶ 21-22.²⁷

range. There is some incentive to negotiate a pay rate so that it maximizes the “spread” a Recruiter earns. “Spread” is the difference between what a candidate is paid and TEK’s costs to place the candidate on assignment, compared to what the client pays TEK for the candidate’s services. However, I have never negotiated pay for a candidate simply to increase spread. My experience is that it is best to negotiate based on what is fair to the candidate, the client, and TEK. Other Recruiters may have different negotiation strategies.”); Ferrari Decl. ¶ 14.

²⁵ Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 22, 32; Doc. 64-1 (Ex. 14) Cunningham Decl. ¶ 21, 32; Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 20, 32; Doc. 64-1 (Ex. 16) Doerner Decl. ¶ 20, 31; Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 20, 31; Doc. 64-1 (Ex. 18) Tillson Decl. ¶ 20, 31; Doc. 64-1 (Ex. 19) Topp Decl. ¶ 21, 32.

²⁶ Haycock Dep. p. 36:9-38:1

²⁷ See also Guffy Decl. ¶ 17-18; Budde Decl. ¶ 20-21.

f. Account Manager acceptance of Recruiter recommendations varies

Plaintiffs and their declarants state that they have little to no say on whether an Account Manager accepts the candidates they present and in turn submit to a client.²⁸ That is not the experience of many Recruiters. Ms. Rothermich testifies that, while Account Managers do not always agree with her candidate recommendations, those with whom she has a long relationship typically will agree with her recommendations for candidates and submit them for consideration by the customer. In fact, Ms. Rothermich will even help a Lead Recruiter with whom she is paired to stack and order (i.e., rank) candidates for design roles because she has more experience and expertise in selecting people to perform within those roles. Rothermich Decl. ¶ 29. Lindzy McCarty testifies that after a couple years in the role, Account Managers very rarely push back on her recommended candidates and trust that the candidate should be submitted to TEK's customer. McCarty Decl. ¶ 14. Ms. Mendez was clear that "Because I am more knowledgeable than the Account Manager about the various technologies that clients expect candidates to have, I work in partnership with the Account Managers to locate and present the best candidates to the hiring managers. I have developed trusted relationships with many of the Account Managers I work with, and they rely solely on my recommendations to forward the candidate to the client, as they trust my judgment on the quality of the candidates." Mendez Decl. ¶ 17.

Similarly, Ms. Levine-Gorelick states that “[i]f after meeting the candidate and contacting their references my judgement is that they are a great candidate for the requirement, then I will present the candidate’s credentials to the Account Manager. Account Managers generally follow my recommendations, especially if we have worked together before.” Levine-Gorelick Decl. ¶ 19.²⁹

²⁸ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 29 (“Account Managers and Account Leads often received potential matches from multiple Recruiters. Account Managers and Account Leads reviewed the candidate information and decided which candidates, if any, would be forwarded to TEKsystems’ client.”); Doc. 64-1 (Ex. 14) Cunningham Decl. ¶ 29 (exact same quote as Brissey); Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 29 (exact same quote as Brissey); Doc. 64-1 (Ex. 16) Doerner Decl. ¶ 28 (exact same quote as Brissey); Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 28 (exact same quote as Brissey); Doc. 64-1 (Ex. 18) Tillson Decl. ¶ 28 (exact same quote as Brissey); Doc. 64-1 (Ex. 19) Topp Decl. ¶ 29 (exact same quote as Brissey).

²⁹ See also, Guffy Decl. ¶ 13; Yancey Decl. ¶ 19; Compton Decl. ¶¶ 21-22 (“I only present a candidate to an Account Manager if the candidate has been fully qualified by me through my vetting process, and if the candidate is excited about the opportunity. I create a package for the Account Manager that explains why the candidate is a good fit, what the candidate’s references had to say, and the results of any technical assessment that the candidate completed. After I send the package to the Account Manager, I will call to tell them to verbally explain why the candidate is a good fit for the requirement. Account Managers I have worked with in the past take my recommendations more often than not. As I mentioned before, the Account Manager and Recruiter relationship is a partnership. If the Account

g. Training varies

Plaintiffs also characterize training as uniform. This is not the case according to several putative class members, however. Recruiter Trainees start with thirteen weeks of training, but much of that training involves observing more experienced Recruiters and engaging in role-playing as a way for the Recruiter Trainee to discover their own style and approach to the role.³⁰

As set forth above, Plaintiffs' own declarants belie their contention that training was a standard thirteen-week process to impose a standardized approach. The vast majority of Plaintiffs' declarants spent between seven months to over a year in the Recruiter Trainee role. In contrast, Lindzy McCarty did not go through Recruiter Trainee training at all, and Ms. Rothermich, Ms. Whitman, Ms. Mendez, and Yasmine Yancy completed their trainee period and became Recruiters in about three months.³¹ Further, the testimony from other Recruiters is clear that what occurred during that training varied substantially. For example, Ms. Rothermich testifies that the company set training was very remedial for her, but also focused on TEK culture and core values. Ms. Rothermich states that her real training was watching YouTube videos on the technology issues she would be recruiting for, as well as shadowing other more experienced recruiters. Rothermich Decl. ¶¶ 7-8. Mr. Stryker, who is a Delivery Manager, but previously worked in the role of a Recruiter states that training is more about learning

Manager and I are aligned that the candidate is a good match for the requirement, it is common for us to call the customer together to explain why we've come to that conclusion "); Harvey Decl. ¶ 19; Kehl Decl. ¶ 13 ("If I am convinced that a candidate is a good match to a job requirement, I will tell the Account Manager why I have decided that a candidate is a good fit. If the Account Manager needs more information, we'll hop on a call to discuss the candidate in further detail. Putting a candidate up for a job for a client is a collaboration between the Recruiter and Account Manager, and once we are on the same page, we will send the candidate over to a client. Account Managers take my recommendation about a candidate most of the time."); Budde Decl., ¶ 19 ("If I decide that a candidate is a good match for a customer's job requirements, I will present the candidate's credentials to the Account Manager. I only do this if I believe that I can provide my personal stamp of approval for the candidate. The Account Manager makes the final decision whether to submit the candidate to the customer, but Account Managers I have worked with before almost always follow my recommendation.")

³⁰ See, DiBenedetto Dep. p. 106:5-107:16 (“Now, if we give the recruiters the ability to select how they hold their conversation, in my experience, if you were to follow the script for a bull’s-eye, it makes it extremely robotic. My direction and my peer’s direction in the classroom has always been, here’s a platform that will give you the ability to focus in on things that can assist you in your conversation. Now, ideally, you want to start broad and then get your way into the personal side of things. Because, remember, we don’t know this individual at this particular point and it would be very hard for, let’s say, you and I to meet and I go straight into your personal life. I don’t think that that conversation’s going to go very far. So in terms of this, it’s not that it’s expected, but it is a tool to leverage, maybe keep it handy on your desk. So it gives you prompts to have conversations and valuable conversations with your consultants.”)

³¹ Rothermich Decl. ¶¶ 1, 3; Whitman Decl. ¶¶ 1, 3; Mendez Decl. ¶¶ 1, 4; Yancey Decl. ¶¶ 1, 3.

1 what it is like to walk a mile in the candidate's shoes and that the goal is to have Recruiters get a sense
 2 of the different recruiting styles used and develop their own style. The training he describes from more
 3 senior Recruiters to Recruiter Trainees is essentially: here are the things that worked for me. Try it out,
 4 if it works for you, great, if not, try something different. Stryker Decl. ¶ 5. Essentially, Recruiters
 5 testify that Training is a vehicle to help them develop their own style of recruiting.³²

6 **h. The industry recruiters focus on**

7 The industries that Recruiters support, as well as the roles they assist in filling vary substantially.
 8 For example, Ms. Rothermich came to TEK with over twenty years of experience at creative agencies.
 9 She was hired to specialize in Design. That involves assisting tech companies to find product, UX/UI
 10 designers, graphic designer and other creative individuals. Rothermich Decl. ¶ 3-4. By contrast, Lindzy
 11 McCarty focuses entirely in placing candidates involved with Adobe software. McCart Decl. ¶¶ 19-23.
 12 Ms. Whitman specializes in healthcare and specifically electronic health record / electronic medical
 13 record software systems. She testifies that '[t]here are unique aspects to work in this specialized area
 14 that impact the way the team learns about and help create reqs. If a project is just beginning, the Account
 15 Manager might join the Recruiting team on a call to provide more background and detail about the
 16 customer and the project. It is common for the Account Manager to ask people from the team to speak
 17 directly with the customer to help develop the requirements, since Recruiters are the experts in the
 18 market for talent. I usually have at least two calls like that per month, and other Recruiters on the team
 19 are doing the same." Whitman Decl. ¶ 15. Ms. Yancey specializes in government contracts in a wide
 20 variety of IT services. She testifies that "[g]overnmental contracts have unique characteristics which set
 21 them apart from contracts with businesses in the private sector, which can make it challenging to find
 22 qualified candidates." Yancey Decl. ¶¶ 10-12.

23

24 ³² See also, Mendez Decl. ¶ 6 ("I learned the recruiting basics through the training, but I also understand
 25 that to be successful as a Recruiter, I needed to develop my own strategies to attract quality candidates
 26 for the various opportunities provided by clients."); Yancey Decl. ¶ 6 ("I understood the purpose of the
 27 training period to be to provide me an opportunity to see how different Recruiters do their work at TEK,
 28 to roleplay the work of Recruiters, and to determine my areas of strengths and areas of improvement.
 Based on the Recruiters' different perspectives and my assessment of my skills, I determined what
 techniques and approaches worked best for me to be a successful Recruiter."); Compton Decl. ¶¶ 6-8;
 Budde Decl., ¶ 8 ("I viewed the purpose of the training period as an opportunity to see how different
 Recruiters do their work at TEK, and from these different perspectives I would find my own voice and
 my own way to do things"); DiBenedetto Dep. p. 106:5-107:16.

F. Supervision Varies From Recruiter to Recruiter

The amount of supervision Recruiters had also varied. Plaintiffs' declarants testify to close supervision of their work.³³ Yet, many recruiters testified to little if any oversight on how they performed their jobs. For example, Ms. Levine-Gorelick testified that while some Recruiters were initially supervised by Account Managers during the beginning of the class period, that is not the case anymore. Levine Gorelick Decl. ¶ 8. Ms. Whitman testifies that she reported to an Account Manager when she first began working as a Recruiter, but that changed in 2016 and she has only reported to other Recruiters since that time. Her observation is that it has become uncommon for Recruiters to be supervised by Account Managers. Whitman Decl. ¶¶ 5, 11-12.³⁴

G. Recorded Recruiter Activities Do Not Capture The Amount Of Time Spent On A Particular Task Or Whether The Recruiter Is Exercising Discretion And Judgment

Plaintiffs focus on the purported fact that 70% of the activities recorded by Recruiter involve G2s or “calls.” What Plaintiffs utterly fail to do is quantify the time spent on those activities. “Calls” as a category are full of variability that is not captured in the activity data; an unanswered call may take 30 seconds or a minute, while a call to screen a candidate for an open position could take an hour or more. Plaintiff have not attempted to determine the time Recruiters spend on activities that are recorded, and the available data does not support such an analysis. What the data does reveal is substantial variation of

³³ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 12 (“I worked under the daily and constant supervision of TEKsystems’ managers.); Doc. 64-1 (Ex. 14) Cunningham Decl. ¶ 12; Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 11; Doc. 64-1 (Ex. 16) Doerner Decl. ¶ 11 (exact same quote as Brissey); Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 11 (exact same quote as Brissey); Doc. 64-1 (Ex. 18) Tillson Decl. ¶ 11 (exact same quote as Brissey); Doc. 64-1 (Ex. 19) Topp Decl. ¶ 12 (exact same quote as Brissey).

³⁴ See also Harvey Decl. ¶¶ 12-13 (“The Account Manager is not my supervisor. I treat it as a partnership to determine how to best address the clients’ hiring needs. The Account Manager manages the network of clients, and I specialize in various types of technologies and develop a network of candidates who have the requisite skills in those technologies. . . My direct supervisor is Josh Gurin, who is a Recruiter Lead. I manage my own day and touch base with him only once or twice a week. I decide on my own how to source candidates, which candidates to interview, which candidates are best qualified for the reqs I am working on, and which candidates to present to an Account Manager. I do not need my Recruiter Lead’s approval to do so.”); Yancey Decl. ¶ 9 (“The Recruiting Lead that I report to is Casey Corley. I check in with her a couple times a week in a small group meeting and have a one-on-one meeting with her every other week. I also reach out to her as needed for assistance with technical questions and to develop the relationship with Account Managers, since she is more familiar with some of them than I am. I work with three to five different Account Managers in a given week.”); Ferrari Decl. ¶ 7-8; Budde Decl. ¶¶ 13-14 (“I have the luxury of choosing which customer job requirements I want to spend time working on. If there is more than one Account Manager with a job requirement to fill for Apple, I can choose which one to partner with. Even though I focus primarily on Apple, I can and do choose to work with other customers at times . . . I do not report to an Account Manager, but I do partner with Account Managers frequently.”)

1 activities recorded even by the four named Plaintiffs.

2 **III. LEGAL ARGUMENT**

3 **A. The Elements Of The Administrative Exemption Under California Law**

4 Employees are administratively exempt from overtime if: (1) their duties and responsibilities
 5 involve the performance of office or non-manual work “directly related” to the management policies or
 6 general business operations of their employer or their employer’s customers; (2) they “customarily and
 7 regularly exercise discretion and independent judgment;” (3) they “perform under only general
 8 supervision work along specialized or technical lines requiring special training, experience or
 9 knowledge;” (4) they are “primarily engaged” in duties meeting the test of the exemption; and (5) they
 10 earn a monthly salary of at least twice the state’s minimum wage for full-time employment.

11 Wage Order 4-2001 §1(A)(2)(f).³⁵

12 Examining the federal regulations incorporated into Wage Order 4-2001,³⁶ the California
 13 Supreme Court described the first two subparts of 29 C.F.R. section 541.205 as the “qualitative” prong:

14 (a) The phrase “directly related to management policies or general business operations of
 15 his employer or his employer’s customers”. describes those types of activities relating to
 16 the administrative operations of a business as distinguished from “production” or, in a
 17 retail or service establishment, “sales” work. In addition to describing the types of
 18 activities, the phrase limits the exemption to persons who perform work of substantial
 19 importance to the management or operation of the business of his employer or his
 20 employer’s customers.

21 (b) The administrative operations of the business include the work performed by so-
 22 called white-collar employees engaged in “servicing” a business as, for, example,
 23 advising the management, planning, negotiating, representing the company, purchasing,
 24 promoting sales, and business research and control. An employee performing such work

25 ³⁵ The current IWC Wage Order No. 4-2001 is codified at 8 C.F.R. § 11040. The Wage Order and the
 26 incorporated federal regulations include within the scope of “exempt work,” “all work that is directly
 27 and closely related to exempt work and work which is properly viewed as a means for carrying out
 28 exempt functions.” *Id.*; 8 C.F.R. § 11040(1)(A)(2)(f) (expressly adopting the federal regulations, but
 also the manner in which those regulations have been “construed”); IWC, Statement as to Basis, § 1
 (“The activities constituting exempt work and non-exempt work shall be construed in the same manner
 as such terms are construed in the following regulations under the Fair Labor Standards Act effective as
 of the date of this order: 29 C.F.R. Sections 541.201-205, 541.207-208, 541.210, and 541.215...”); *see*
<https://www.dir.ca.gov/iwc/statementbasis.htm> (accessed October 10, 2017). The only difference is the
 definition of “primary” duty, which includes a “50% of work” time rule.

29 ³⁶ As *Harris* explains, Wage Order 4-2001 not only closely tracks the FLSA administrative exemption, it
 adopts the regulations issued by the Secretary of Labor. *Id.* at 179-80. IWC’s “Statements As to the
 Basis” accompanying Wage Order 4-2001 at pp. 2-3. The activities constituting exempt work and non-
 exempt work “shall be construed in the same manner as such terms are construed in the following
 regulations under the Fair Labor Standards Act: 29 C.F.R. sections 541.201-05, 541.207-08, 541.210,
 and 541.215.” *Harris*, 53 Cal.4th at 178. In other words, in applying Wage Order 4-2001, “just as the
 [labor] statute is understood in light of the wage order, the wage order is construed in light of the
 incorporated federal regulations.” *Id.*

1 is engaged in activities relating to the administrative operations of the business
 2 notwithstanding that he is employed as an administrative assistant to an executive in the
 3 production department of the business.

4 *Harris*, 53 Cal.4th at 181-82.

5 The Court described subpart (c) of section 541.205, which further explains the term “substantial
 6 importance” in subpart (a), as the “quantitative” prong. *Id.* at 181.

7 (c) As used to describe work of substantial importance to the management or operation of
 8 the business, the phrase “directly related to management policies or general business
 9 operations” is not limited to persons who participate in the formulation of management
 10 policies or in the operation of the business as a whole. Employees whose work is
 11 “directly related” to management policies or to general business operations include those
 12 work affects policy or whose responsibility it is to execute or carry it out. The phrase
 13 also includes a wide variety of persons who either carry out major assignments in
 14 conducting the operations of the business, or whose work affects business operations to a
 15 substantial degree, even though their assignments are tasks related to the operation of a
 16 particular segment of the business.

17 Significantly, section 541.205(c)(5) provides that “[t]he test of ‘directly related to’ management
 18 policies or general business operations’ is also met by many persons employed as advisory specialists
 19 and consultants of various kinds, credit managers, safety directors, claim agents and adjusters, wage-rate
 20 analysts, tax experts, account executives of advertising agencies, customers’ brokers in stock exchange
 21 firms, promotion men, and many others.” 29 C.F.R. 541.205(c)(5) (emphasis added). None of the
 22 referenced positions “formulat[e] policy” or “set[] [the company’s] strategic course.” To determine
 23 whether work is “administrative,” the California Supreme Court directs that **the incorporated subparts**
 24 **of section 541.205 must be read together as a whole.** *Harris*, 53 Cal.4th at 188.

25 **B. Whether Recruiters Perform Work That Is “Directly Related” To The Management
 26 Policies Or General Business Operations Is Not A Certifiable Question**

27 Plaintiffs argue that certification is appropriate because one element of the administrative
 28 exemption—whether Recruiters meet the “qualitative” component of the “directly related to” portion of
 29 the regulation—can be adjudicated on a classwide basis. Plaintiffs take the erroneous position that
 30 meeting the “directly related to” prong requires employees to be formulating policy or setting TEK’s
 31 strategic course, and Plaintiffs argue that Recruiter’s work only goes to TEK’s “business purpose” and
 32 “market offering.” Plaintiffs’ theory is not a certifiable question. Importantly, Plaintiffs’ proposed
 33 theory that Recruiters do not perform duties that can meet the qualitative prong of the exemption cannot

1 be a common question upon which certification is based because Plaintiffs' argument ignores the
 2 California Supreme Court's explicit directive that the regulations interpreting the administrative
 3 exemption—29 C.F.R. 541.205(a), (b) and (c)—must be read as a whole.

4 Plaintiffs' theory—that an employee does not meet the "qualitative prong" unless the employee
 5 sets policy—is the same reasoning used by the California Court of Appeal that was reversed and
 6 depublished by the California Supreme Court in *Harris*. Any citation to the **unpublished** second Court
 7 of Appeal decision in *Harris* is also without merit and cannot support certification in this case. The point
 8 is underscored by the precedent applying *Harris*. The California Supreme Court's decision in *Harris*
 9 generally "does away with the administrative-production dichotomy previously utilized by courts."

10 *Rieve v. Coventry Health Care, Inc.*, 870 F. Supp. 2d 856, 869 (C.D. Cal. 2012). ³⁷

11 Critically, Plaintiffs ignore the fact that the appropriate analysis, even if the Court were to accept
 12 the administrative/production dichotomy, is not limited to the employee's direct employer (in this case,
 13 TEK) but must also be conducted as to "**the employer's customers.**" Here, Plaintiffs do not even
 14 attempt to argue, and therefore concede that Recruiters are not production employees for TEK's
 15 customers. Instead, Recruiters are unquestionably directly involved in the running and servicing of
 16 TEK's clients' businesses. Recruiters serve as **personnel management and human resources**
 17 recruiters to staff critical positions for a variety of TEK's customers in a variety of industries. The
 18 recruitment services that TEK Recruiters provide are not the primary business of the technology
 19 companies, bio engineering, education institutions, non-profits, or any other company that TEK provides
 20 services for and thus the holding only supports denial of certification in this case.

21 **1. Employees need not set policy to meet the administrative exemption**

22 Despite the overruling of the first decision and the depublication of the second, Plaintiffs
 23 nonetheless ask the Court to adopt the reasoning advanced by the California Court of Appeal in *Harris*

24 ³⁷ Also of note is that reliance on the unpublished Court of Appeal decision in *Harris* has been found to
 25 be a basis for reconsideration of an order to certify an exemption class analyzed under the administrative
 26 exemption. See, *Farmers Ins. Exchange v. Superior Court*, 218 Cal. App. 4th 96 (2013) (denial of
 27 reconsideration of class certification order reversed and mandate issued where the certification order
 relied on the then published *Harris* Court of Appeal decision, and that its depublication by the California
 Supreme Court constituted a "change in the law," holding "Because depublication renders the opinion
 noncitable and removes its precedential value, it nullifies the opinion and renders it nonexistent");
Wilson v. Farmers Ins. Exch., 2016 Cal. App. Unpub. LEXIS 3903 (2016) (affirming denial of
 certification of proposed class of exempt employees analyzed under the administrative exemption
 following mandate issued after depublication of Court of Appeal decision in *Harris*).

1 and require that administrative work be performed only at a policy-making level in order to meet the
 2 exemption. *Harris*, 53 Cal.4th at 189. This rationale is at odds with the express language of the
 3 regulations and the California Supreme Court’s directive in *Harris*. The qualitative “directly related to”
 4 element describes “activities relating to the administrative operations of a business” which are “of
 5 substantial importance to the management or operation of the business.” 29 CFR § 541.205(a). The
 6 regulations expressly state that an administratively exempt **employee need not “participate in the**
 7 **formulation of management policies or in the operation of the business as a whole;”** rather, the
 8 exemption is satisfied by those whose “work affects policy or **whose responsibility it is to execute or**
 9 **carry it out.”** 29 C.F.R. § 541.205(c) (emphasis added).

10 **2. *Harris* recognized the limitations of the administrative/production dichotomy**

11 Relying on *McKeen-Chaplin v. Provident Savings Bank, FSB*, 862 F.3d 847 (9th Cir. 2017),
 12 Plaintiffs erroneously argue that whether or not Recruiters satisfy the administrative/production
 13 dichotomy presents a common question subject to certification. Critically, the California Supreme Court
 14 in *Harris* made clear “the limitations of the administrative/production worker dichotomy itself as an
 15 analytical tool.” *Harris*, 53 Cal.4th at 181-82.³⁸ “[T]he dichotomy is a judicially created creature of the
 16 common law” and “has been effectively superseded in this context by the more specific and detailed
 17 statutory and regulatory enactments.” Courts must “apply[] the language of the relevant wage order and
 18 regulations,” and avoid providing “its own gloss to the administrative/production worker dichotomy.”
 19 *Id.* at 188. *McKeen-Chaplin* addressed mortgage underwriters allegedly misclassified as exempt under
 20 the FLSA, but not California law, meaning the Ninth Circuit had no occasion to consider the impact of
 21 *Harris*. *Harris* is binding on this Court’s application of the Wage Order’s administrative exemption.
 22 Because the administrative/production dichotomy is not a dispositive test, it cannot form the basis for
 23 class certification.

24 Similarly, Plaintiffs’ citation to *Walsh v. Unitil Serv. Corp.*, 64 F.4th 1 (1st Cir. March 22, 2023),

25 ³⁸ See also *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640, 650 (6th Cir. 2013) (“not all work is
 26 classified as either production or administrative, as this dichotomy does not fit all cases”); *Bothell v.*
 27 *Phase Metric, Inc.*, 299 F.3d 1120, 1127 (9th Cir. 2002)(the dichotomy is “but one analytical tool, to be
 28 used only to the extent that it clarifies the analysis [and o]nly when work falls squarely on the
 production side of the line has the administrative/production dichotomy been determinative.”); *Roe-*
Midgett CC Services, Inc., 512 F.3d 865, 872-73 (7th Cir. 2008)(The “typical example” of the dichotomy
 is a “factory setting,” “an analogy that is not terribly useful” in a service context, , much less a high-tech
 one.)

1 is also without merit. *Walsh* involved the appeal of summary judgment in favor of the employer
 2 regarding the exempt classification under the FLSA of electric grid controllers and utility gas
 3 dispatchers. *Id.* at *4-5. The Court of Appeal reversed the summary judgment ruling and noted that the
 4 second prong of the exemption applies:

5 [I]f he or she “perform[s] work directly related to assisting with the running or servicing
 6 of the business, as distinguished, for example, from working on a manufacturing
 7 production line or selling a product in a retail or service establishment.” And separately,
 8 the regulations state that “[w]ork directly related to management or general business
 9 operations” can include, “but is not limited to, work in functional areas such as tax;
 10 finance; accounting; budgeting; auditing; insurance; quality control; purchasing;
 11 procurement; advertising; marketing; research; safety and health; **personnel**
 12 **management; human resources;** employee benefits; labor relations; public relations[;]
 13 government relations; computer network, internet and database administration; legal and
 14 regulatory compliance; and similar activities.

15 *Id.* (Citations omitted, emphasis added). The Court continued on that “it is often useful to identify and
 16 articulate the business purpose of the employer and **(if necessary) the employer’s customers.** By
 17 “business purpose” we mean the production or provision of ‘the very product or service that the’
 18 employer or its customers ‘offers to the public.’ Plaintiffs construe this holding to support their view
 19 that TEK offers recruitment services, and Recruiters provide that very same service. In that way,
 20 Plaintiffs contend that Recruiters fail to meet the second prong of the exemption. Moreover, as
 21 discussed, *Walsh* simply doubles down on the administrative/production dichotomy that was expressly
 22 rejected by the California Supreme Court in *Harris*.

23 Plaintiffs’ reliance on *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896 (3rd Cir. 1991) for the
 24 same proposition is also misplaced. In *Martin*, the court was presented with the question of whether
 25 inside salespersons qualified as exempt from overtime under the FLSA. The court found that the
 26 plaintiffs were not properly classified as exempt. In support of its ruling, the court relied on the
 27 administrative/production dichotomy, and further based its decision on the fact that the parties in that
 28 case stipulated that the core business of the employer was to produce sales, which the court found is
 exactly what the plaintiffs did. *Martin*, 940 F.2d at 903-904. *Martin* is distinguishable, first, because it
 does not involve questions of California law, and because it was decided prior to the California Supreme
 Court’s decision in *Harris*, and thus fails to take into account the Supreme Court’s guidance. Second,
 even if the dichotomy were improperly applied to this case in contravention of the Supreme Court’s

1 guidance, it still does not lend support to Plaintiffs. Unlike in *Martin*, where the parties stipulated that
 2 the core business of the employer was to “produce sales,” it is patently clear that TEK’s **customers**’ core
 3 business is **not** to recruit candidates.³⁹

4 Similarly, Plaintiffs’ reliance on *Nelson v. Avon Prods.*, 2015 U.S. Dist. LEXIS 51104 (N.D. Cal.
 5 April 17, 2015), is also misplaced. *Nelson* involved the classification of District Sales Managers whose
 6 job was in part to recruit sales representatives for the company. In that case, the plaintiffs testified that
 7 their duties were to “recruit anyone with a pulse.” *Id.* at *6. The Court ultimately granted certification
 8 of the proposed class, but focused on the regulations as a whole, finding common issues related to
 9 supervision, judgment and discretion, and whether the work performed was directly related to the
 10 management of Avon’s business. *Id.* at *19.

11 Critically, the Court in *Nelson* did not evaluate whether the putative class in that case was
 12 servicing the general business operations of Avon’s **customers**. As discussed, here, the inquiry must
 13 also extend to TEK’s customers and whether Recruiters are servicing their general business operations.
 14 Plaintiffs cannot dispute that is the case.⁴⁰ The case law is clear that such activity qualifies as
 15 administratively exempt. *See Delodder v. Aerotek*, 471 Fed. Appx. 804, 807 (9th Cir. 2012) (District
 16 Court did not err in finding that “all class members were engaged in ‘meeting the needs of Aerotek’s
 17 customer companies,’ a role that is ‘directly related to . . . [Aerotek’s] general business operations,’ and
 18 therefore exempt”); *Andrade v. Aerotek*, 2010 U.S. Dist. LEXIS 117754 (D. Md. November 5, 2010)
 19 (work as a Recruiter was directly related to the management or business operations of Aerotek’s
 20 customers); *Goff v. Bayada Nurses, Inc.*, 424 F. Supp. 2d 816, 824 (E.D. Pa. 2006) (holding that the job
 21 of supervisor at a provider of in-home nurses who “matched nurses to patients” and was involved in
 22 “case managing to ensure that the employee retains a positive relationship with the client” was directly
 23 related to the management or business operations of the employer or its clients); *Hudkins v. Maxim*

24
 25 ³⁹ Plaintiffs citation to *Eicher v. Advanced Business Integrators, Inc.*, 151 Cal. App 4th 1363 (2007), is
 26 also without merit. The case was decided before *Harris*, analyzed the employee’s job duties as a
 27 computer professional through the lens of the administrative/production dichotomy, a method of
 28 analysis specifically rejected by *Harris* in this context.

⁴⁰ See Compton Decl. ¶ 16 (“For example, one of my largest customers is a financial services firm. I have worked with that firm to find people to work on a contract-to-hire as part of a project team that is modernizing the firm’s main trading platform from legacy code into a modern tool. This is a project that impacts every person who invests through that firm, and the project has the attention of the highest levels of leadership.”)

1 *Healthcare Servs.*, 39 F. Supp. 2d 1349, 1350 (M.D. Fla. 1998) (holding that the primary duty of a
 2 recruiter at a company that placed nurses in hospitals “was directly related to the Defendant’s general
 3 business operation”). The same is true here.

4 Consequently, Plaintiffs’ federal authorities interpreting the FLSA and resurrecting the
 5 dichotomy present neither binding nor persuasive authority on the issue of certification of the proposed
 6 California Rule 23 class.

7 **B. Common Questions Are Not Subject To Common Proof Because The Exemption
 8 Analysis Requires An Inquiry Into The Job Performance Of Recruiters**

9 Plaintiffs’ arguments contradict the California Supreme Court’s dictates in *Harris*. “[I]n
 10 resolving whether work qualifies as administrative, courts must consider the particular facts before them
 11 and apply the language of the statutes and wage orders at issue.” *Id.* at 190.

12 **1. Determining whether each Recruiter is exempt requires a week-by-week
 13 assessment of whether the worker was “primarily engaged” in exempt work**

14 Reading the regulations as a whole requires an analysis that starts with what a particular
 15 Recruiter actually does and *how* the Recruiter performs those tasks. For example, in *Fjeld v. Penske
 16 Logistics, LLC*, 2013 WL 8360535 (C.D. Cal. 2013), the district court denied certification to a putative
 17 class of exempt operations supervisors working for a logistics company. The court applied the
 18 reasoning of *Harris* and denied certification because common issues did not predominate as to whether a
 19 core set of duties or tasks qualified for the administrative exemption. An individual inquiry was
 20 required to determine *how* the tasks were performed by each putative class member:

21 In other words, to conduct the relevant analyses, **it’s not enough to know what tasks the
 22 Operations Supervisors are performing**, we also need to know **how they are doing it**.
 23 For there to be classwide answers on whether the relevant tasks are exempt, Plaintiff
 must make a threshold showing that the putative class members are performing the tasks
 in a substantially similar manner, e.g., by taking into account a similar set of factors.

24 *Id.* at *14 (emphasis added).

25 Determining whether each Recruiter is exempt requires examining both the work performed and
 26 “realistic employer expectations.” *Ramirez v. Yosemite Water Co.*, 20 Cal.4th 785, 802 (1999); Wage
 27 Order 4-2001 § 2(K). “[C]ourts have routinely concluded that an individualized inquiry is necessary
 28 even where the alleged misclassification involves application of a uniform classification policy because

1 the policy may properly classify some employees as exempt but not others.” *Arenas v. El Torito*
 2 *Restaurants, Inc.*, 183 Cal. App. 4th 723, 734 (2010) (claim that managers were misclassified on the
 3 basis of their job descriptions was not amenable to common proof where the evidence showed that
 4 managers’ duties and the time spent on individual tasks varied significantly from one restaurant to
 5 another); *Soderstedt v. CBIZ S. Cal. LLC*, 197 Cal. App. 4th 133, 152-153 (2011) (explaining
 6 application of *Ramirez* in the class action context).

7 Plaintiffs’ claim that every Recruiter performs the same job duty—screening candidates for
 8 placement in the IT field—even if true, gets them nowhere. Plaintiffs are therefore left to argue that no
 9 Recruiter exercises discretion and independent judgment. Even if Plaintiffs and their seven declarants
 10 testified that they mechanically followed checklists and job requisition requirements rather than using
 11 their independent discretion and judgment in the evaluation and screening candidates, numerous other
 12 Recruiters disagree. As discussed, multiple Recruiters testify that they use their discretion and judgment
 13 to decide which job requisitions to work on⁴¹, use their discretion and judgment to create sourcing
 14 strategies that will find potentially qualified candidates⁴², use their discretion and judgment to screen
 15 and evaluate candidates⁴³, use their discretion and judgment to determine which candidates to submit for
 16 a position, use their discretion and judgment to prepare candidates for consideration by TEK’s
 17 customers⁴⁴, use their discretion and judgment to determine what compensation to offer candidates, and

18
 19 ⁴¹ Harvey Decl. ¶ 8; Stryker ¶ 16; Levine-Gorelick ¶ 14; McCarty ¶ 26.
 20

21 See, Mendez Decl. ¶ 13 (“I have to be creative and resourceful to locate good candidates for a
 22 position. I maintain an extensive network of hundreds of potential candidates to reach out to for
 23 positions, which is the most productive way to find candidates who will be successful in obtaining the
 24 position”); Harvey Decl. ¶¶ 9-10 (“My experience with sourcing candidates is that I need to be creative
 25 and resourceful to locate good candidates. I manage a personal network of about 300 individuals who
 26 are in different stages of employment and are a primary source for candidates. I try to reach out to them
 27 about once a week or once a month to determine their needs and qualifications. I also use referrals from
 28 my network to find qualified individuals. If I do not have enough candidates from the personal network
 and referrals, then I will use the Connected database to search for additional candidates. In Connected, I
 create my own search strings and use filters to narrow in on candidates meet the basic qualifications for
 the req. I decide which candidates should continue in the process”); Guffy Decl. ¶¶ 10-11 (“When I am
 working on a requirement, I create my own strategy to source talent, and I expect other Recruiters to do
 the same. . . What sets a good Recruiter apart when it comes to sourcing is the ability to be strategic and
 innovative about how they find talent. Search filters alone are not enough to find) the best candidates. It
 is up to the Recruiter to interpret and use the details they find about candidates.”); Ferrari Decl. ¶ 11;
 Budde Decl. ¶ 18.

⁴² Rothermich Decl. ¶¶ 3-10; Stryker Decl. ¶ 20; Whitman Decl. ¶ 20 (“I also make judgements based on
 what I know about the client and the project”); Mendez Decl. ¶ 9, 14; Guffy Decl. ¶ 12; McCarty Decl. ¶
 15; Budde Decl. ¶¶ 18, 20-21.

⁴³ Rothermich Decl. ¶ 31; McCarty Decl. ¶ 16; Levine-Gorelick Decl. ¶ 21; Guffy Decl. ¶¶ 17-18.

1 use their discretion and judgment to manage consultants placed on assignment.⁴⁵ Thus, there are
 2 significant variations in Recruiters' individual experiences that are fundamentally at odds with a finding
 3 that their job duties are subject to common proof. Whether putative class members customarily and
 4 regularly exercise "discretion and independent judgment," and whether they are engaged in "duties and
 5 responsibilities" that meet the test of the exemption for more than fifty percent of their working hours,
 6 present individualized questions of fact.

7 Plaintiffs must put forth *common evidence* to support a claim for class-wide misclassification
 8 under California law, either "that deliberate misclassification was [TEK's] policy or practice or
 9 similarly, that classification based on job descriptions alone resulted in widespread *de facto*
 10 misclassification." *Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 481 (C.D.Cal. 2008), *aff'd*, 639
 11 F.3d 942 (9th Cir.2011) (denying class certification). Determining exempt classification is a fact-
 12 intensive inquiry that requires an individualized analysis of the actual hours worked, percentage of
 13 exempt versus non-exempt work performed, and particular job experiences. *In re Wells Fargo Home*
 14 *Mortg. Overtime Pay Litigation*, 571 F.3d 953, 956-959 (9th Cir. 2009). Moreover, neither a common
 15 reporting structure nor a common classification decision "eliminate[s] the need to make a factual
 16 determination as to whether class members are actually performing similar duties." *Id.*; *Velazquez v.*
 17 *Costco Wholesale Corp.*, 2011 WL 4891027, *8 (C.D. Cal. 2011) ("vague nature" of duties in job
 18 description means "inquiry into whether or not an [employee] is properly classified as exempt because
 19 individual in nature"); *citing Cruz v. Dollar Tree Stores, Inc.*, 2011 WL 2682967, *8 (N.D.Cal. 2011)
 20 (uniform policies and training materials do not "provide common proof of whether the [employees] were
 21 spending more than fifty percent of their time performing exempt tasks").

22 Here, Plaintiffs have not established that any particular policy had a uniform impact on
 23 Recruiters' duties and time spent on those duties. For example, Plaintiffs' declarations imply that
 24 training and checklists, as well as the use of screening tools deprived them of discretion and judgment.
 25 Plaintiffs assert that recruiters operated as entry level personnel clerks deprived of any discretion on who
 26 to submit for an open position. But the evidence demonstrates that many Recruiters did not use these
 27 same tools, checklists, or other technology **at all**, or used them merely as a starting point for an in-depth
 28

⁴⁵ Rothermich Decl. ¶¶ 15, 21-23; Whitman Decl. ¶ 22; Mendez Decl. ¶ 15; Guffy Decl. ¶ 15

1 evaluation and screening of a candidate.⁴⁶ The evidence demonstrates that Recruiters frequently gain in-
 2 depth knowledge of TEK's clients, coordinate the needs of those clients and their industries, and
 3 evaluate candidates using their experience and judgment.⁴⁷ Moreover, the evidence demonstrates that
 4 Recruiters do not simply submit every potential candidate to an open role, but instead determine whether
 5 the candidate is a good fit for the job requisition beyond merely looking at their resume and LinkedIn
 6 profile.⁴⁸ Thus, a major piece of Plaintiffs' "common evidence" actually requires individualized
 7 inquiries to determine what, if any, impact screening tools and checklists had on their performance.

8 Moreover, Plaintiffs' broad refrain that their main job duty is to screen candidates cannot amount
 9 to common evidence of misclassification because it is not *per se* evidence of misclassification. As a
 10 result, this general description does not override the need to perform individualized analyses of what
 11 work Recruiters actually performed week-by-week. *Weigele v. FedEx Ground Package Sys., Inc.*, 267
 12 F.R.D. 614, 622 (S.D. Cal. 2010) (denying certification of allegedly misclassified employees because
 13 common issues did not predominate); *Barker v. U.S. Bancorp.*, 2017 WL 2620676, at *3 (S.D. Cal.
 14 2017) (question of whether class members spent over 50% of their time performing non-exempt duties
 15 "requires an individualized inquiry into how each [employee] spent her time working").⁴⁹

16 2. **Classifying Recruiters as exempt fails to raise a common question**

17 As the California Supreme Court stressed, "unless an employer's uniform policy or consistent
 18 practice violate wage and hour laws, California courts have been reluctant to certify class actions
 19 alleging misclassification." *Duran v. U.S. Bank Nat. Assn.*, 59 Cal.4th 1, 30-31 (2014). Here, Plaintiffs
 20 argue there are uniform policies based on the uniform classification of all Recruiters as exempt
 21 employees. California and federal courts, however, have rejected the theory that a uniform classification

22 ⁴⁶ Rothermich Decl. ¶¶ 19-24; Levine-Gorelick Decl. ¶¶ 18-19; Mendez Decl. ¶¶ 9, 14; Harvey Decl. ¶¶
 23 11-15; Guffy Decl. ¶ 12; McCarty Decl. ¶¶ 12-15.

24 ⁴⁷ Rothermich Decl. ¶¶ 15-18; McCarty Decl. ¶¶ 14, 19-23; Levine-Gorelick Decl. ¶¶ 23, 24; Guffy
 25 Decl. ¶¶ 17-18; Whitman Decl. ¶¶ 22-24; Mendez Decl. ¶ 11; Harvey Decl. ¶ 8.

26 ⁴⁸ Mendez Decl. ¶¶ 8, 15; Harvey Decl. ¶ 19; Guffy Decl. ¶ 13; Compton ¶ 21; Levine-Gorelick ¶ 19.
 27 Budde Decl., ¶ 19.

28 ⁴⁹ *See also Roth v. CHA Hollywood Med. Ctr., L.P.*, 2013 WL 5775129, at *7 (C.D. Cal. 2013) (class
 29 certification not appropriate "[w]hen the impact of an employer's policies depends on each individual
 30 employee's circumstances..."); *Williams v. Lockheed Martin Corp.*, 2011 WL 2200631, *15 (S.D. Cal.
 31 2011) ("the need for individual inquiry is not reduced by the presence of centralized control or standard
 32 policies governing how employees spend their time"); *Pedroza v. Petsmart, Inc.*, 2013 WL 1490667, *7
 33 (C.D. Cal. 2013) (denying class certification because scheduling system, staffing reports, and other
 34 business records had "limited value" as proof of class-wide misclassification).

1 of recruiters as exempt creates a common issue. *Marlo v. United Parcel Svc., Inc.*, 639 F.3d 942, 948
 2 (9th Cir. 2011) (“policy classifying [managers] as exempt from overtime-pay requirements does not
 3 necessarily establish that [managers] were misclassified, because the policy may have accurately
 4 classified some employees and misclassified others”); *In re Wells Fargo*, 571 F.3d at 959 (reversing
 5 certification based on the uniform classification of the position as exempt).⁵⁰

6 **C. Individualized Issues Exist as to Whether Recruiters Customarily and Regularly
 7 Exercise Discretion and Judgment**

8 The exercise of discretion and independent judgment “involves the comparison and the
 9 evaluation of possible courses of conduct and acting or making a decision after the various possibilities
 10 have been considered.” Wage Order 4-2001(A).⁵¹ This phrase “implies that the person has the authority
 11 or power to make an independent choice, free from immediate direction or supervision and with respect
 12 to matters of significance.” *Id.* at §541.207(a). The regulations “do not require the exercise of discretion
 13 and independent judgment at so high a level.” *Id.* at (d). “Customarily and regularly” means a task is
 14 performed on a recurring basis each week, as opposed to being performed only sporadically. *Id.* at
 15 §541.701. For example, exempt employees can make use of a “best practices” manual, but the use of
 16 even a detailed manual does not eliminate discretion and independent judgment.⁵² Indeed, even where a
 17 supervisor “regularly speaks” to the employee, courts have found that fact alone insufficient to override
 18 the application of the administrative exemption.⁵³

19 Despite Plaintiffs’ assertions that TEK’s sourcing and screening tools and their interactions with
 20

21 ⁵⁰ *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946-47 (9th Cir. 2009) (abuse of discretion to
 22 reply on “internal uniform exemption policy to the near exclusion of other factors relevant to the
 23 predominance inquiry”); *Dunbar v. Albertson’s Inc.*, 141 Cal. App. 4th 1422, 1427-28 (2006) (evidence
 24 of standardized or uniform policy or practice to classify employees as exempt did not compel class
 25 certification as “that single policy decision may be improper as to some putative class members but
 26 proper as to others”).

27 ⁵¹ 29 C.F.R. § 541.207(a) (“the comparison and the evaluation of possible courses of conduct and acting
 28 or making a decision after the various possibilities have been considered”).

⁵² See *In re Farmers Ins. Exch.*, 481 F.3d at 1129-1130; *McAllister*, 325 F.3d 997, 1001 (8th Cir. 2003)
 (“just because McAllister was required to follow detailed manuals does not mean she did not exercise
 discretion and independent judgment”); *Rix v. Lockheed Martin Corp.*, 2011 WL 890744, *8 (S.D. Cal.
 2011) (denying class certification because uniform guidelines were “not policies that provide insight as
 to how each [class member] actually spends his or her time”).

⁵³ *Maddox v. Cont’l Cas. Co.*, 2011 WL 6825483, *7 (C.D. Cal. 2011) (“Although Plaintiff’s supervisor
 regularly spoke to Plaintiff about the status of his accounts, conducted periodic meetings, and audited
 Plaintiff’s files, those activities do not constitute more than general supervision.”).

1 Account Managers deprived them of discretion and judgment⁵⁴, other Recruiters testified that the
 2 screening tools were only a starting point for their duties, and further many had little oversight from
 3 Account Managers, and instead independently developed their own network of highly qualified
 4 candidates.⁵⁵ Testimony also reveals sharp contrasts in the way Recruiters performed their jobs on tasks
 5 such as evaluating potential candidates, responding to particular job requisitions, interacting with TEK's
 6 clients, and oversight of a candidate's career. Many Recruiters operated independently and worked with
 7 a variety of Account Managers from across the county, leaving Recruiters with great discretion and
 8 judgment on how to evaluate and source candidates as well as which candidates to submit for a
 9 particular job requisition.⁵⁶

10 Plaintiffs argue they had no discretion and judgment when performing their duties, and simply
 11 checked for minimum qualifications and submitted any candidate that met them and answered the
 12 phone.⁵⁷ Yet, many other Recruiters say the opposite. In fact, several Recruiters even testified that they
 13 would be failing to do their job if they submitted every potential match to an Account Manager and let
 14 the Account Manager decide. Such conduct would run contrary to expectations regarding how
 15 Recruiters are relied upon to screen and evaluate candidates, and a Recruiter that does so "will not last
 16 long."⁵⁸ The precise level of discretion and judgment used by each Recruiter depends on, among other
 17 things, the client who has provided the job requirements, the industry the job requisition is in, and the
 18 specific job to be filled, the network and expertise developed by the Recruiter, the marketplace for a
 19

20 ⁵⁴ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 13-21; Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 3, 6, 8; Doc. 64-1
 21 (Ex. 16) Dorner Decl. ¶ 3, 6, 8; Doc. 64-1 (Ex. 18) Tillison Decl. ¶ 3, 6, 8; Doc. 64-1 (Ex. 17) Larsen
 22 Decl. ¶ 3, 6, 8; Doc. 64-1 (Ex. 19) Larsen Decl. ¶ 3, 6, 8.

23 ⁵⁵ Levine Gorelick Decl. ¶ 8; Whitman Decl. ¶¶ 8-9, 20-21; Compton ¶¶ 13, 22, 28; Boland ¶ 3 (as an
 24 Account Manager, Boland partners with Recruiters); Harvey Decl. ¶ 12-13 ("The Account Manager is
 25 not my supervisor. I treat it as a partnership to determine how to best address the clients' hiring needs.
 26 The Account Manager manages the network of clients, and I specialize in various types of technologies
 27 and develop a network of candidates who have the requisite skills in those technologies. . . My direct
 28 supervisor is Josh Gurin, who is a Recruiter Lead. I manage my own day and touch base with him only
 once or twice a week. I decide on my own how to source candidates, which candidates to interview,
 which candidates are best qualified for the reqs I am working on, and which candidates to present to an
 Account Manager. I do not need my Recruiter Lead's approval to do so.")

⁵⁶ McCarty Decl. ¶¶ 11-12; Mendez Decl. ¶ 12; Harvey Decl. ¶ 19; Guffy Decl. ¶ 13.

29 ⁵⁷ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 28 ("If a candidate's listed skills matched the Requirement, I
 30 sent the candidate's resume and information about the candidate to the Account Manager or Account
 31 Lead."); Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 28 (exact same quote as Brissey); Doc. 64-1 (Ex. 17) Larsen
 32 Decl. ¶ 27 (exact same quote as Brissey); Doc. 64-1 (Ex. 19) Topp Decl. ¶ 28 (exact same quote as
 33 Brissey).

⁵⁸ Rothermich Decl. ¶¶ 20-28; Stryker Decl. ¶ 20.

particular set of skills, the depth of knowledge a candidate can relay to the recruiter beyond their resume, and the cultural fit for a particular employer, among other things. As demonstrated above, there is a wide variation among Recruiters on how they accomplish these tasks. Some Recruiters evaluate highly specific technical skills, and the depth of experience applying those skills; some evaluate aesthetic and artistic portfolios; some evaluate the candidate's personal presentation and potential team and culture fit; and some evaluate whether the actual experience set forth in the candidate's resume aligns with the job requisition at hand.

1. The use of screening and sourcing tools and checklists does not eliminate Recruiters' use of independent judgment and discretion

Plaintiffs and their declarants asserts that Recruiters are obligated to mechanically utilize checklists and screening tools to screen candidates, and that there is little thought or discretion in doing so.⁵⁹ Yet, multiple Recruiters testified that the checklists, sourcing tools, and screening tools were only a starting point to their job (if they even used them at all), and that the evaluation of potential candidates for a specific role, or even for placement in a role chosen specifically for that candidate takes additional insight, judgment, and discretion.⁶⁰ Regardless, it is well established that exempt employees can make use of a “best practices” manual, and that the use of even a detailed manual does not eliminate discretion and independent judgment. *See In re Farmers Ins. Exch.*, 481 F.3d 1119, 1129-1130 (9th Cir. 2007); *McAllister v. Transamerica Occidental Life Ins.*, 325 F.3d 997, 1001 (8th Cir. 2003) (“just because McAllister was required to follow detailed manuals does not mean she did not exercise discretion and independent judgment”); *Cheatham v. Allstate Ins. Co.*, 465 F.3d 578, 585 (5th Cir. 2006); *McLaughlin*

⁵⁹ See Doc. 64-1 (Ex. 13) Brissey Decl. ¶ 28 (“If a candidate’s listed skills matched the Requirement, I sent the candidate’s resume and information about the candidate to the Account Manager or Account Lead.”); Doc. 64-1 (Ex. 15) DeCair Decl. ¶ 28 (exact same quote as Brissey); Doc. 64-1 (Ex. 17) Larsen Decl. ¶ 27 (exact same quote as Brissey); Doc. 64-1 (Ex. 19) Topp Decl. ¶ 28 (exact same quote as Brissey).

⁶⁰ Whitman Decl. ¶ 20 (“I evaluate the candidates to decide whether to move forward with them. It is not enough to find people with experience who have experience with Epic or Cerner software, for example. I make sure that they have experience with the specific modules (components) in the software that are relevant to the customer’s project, and I consider whether they have earned special credentials in any relevant areas. I also make judgements based on what I know about the client and the project. For example, if the requisition is for someone to maintain a system that is relatively straightforward, a less experienced candidate may satisfy the requirements. On the other hand, a project that is at the point of doing a complex integration between existing software and new components will usually demand someone with more experience and a track record of completing similar projects.”); Mendez Decl. ¶ 9, 14; Harney Decl. ¶¶ 11-15; Guffy Decl. ¶ 12; McCarty Decl. ¶¶ 12, 15.

1 *v. Nationwide Mut. Ins. Co.*, 2004 WL 1857112 at *11 (D.Or. August 18, 2004) (“virtually every
 2 employee in America ... must follow company policies, procedures and guidelines”); *Rix v. Lockheed*
 3 *Martin Corp.*, 2011 WL 890744, *8 (S.D. Cal. 2011) (in denying class certification, the court rejected
 4 the plaintiff’s argument that manuals and uniform training programs could overcome individual
 5 inquiries because they were “not policies that provide insight as to how each [class member] actually
 6 spends his or her time”). Here, the fact that Recruiters may use tools to identify potential candidates that
 7 meet, at a surface level, the job requirements for a new requisition is only the starting point of the
 8 inquiry. What is necessary is then to ask: then what? As demonstrated above, if the Recruiter even used
 9 sourcing tools the next step involved a more detailed, nuanced decision process that factors in the
 10 Recruiter’s judgment, knowledge about a particular customer or market for a particular skill, and
 11 ultimately their discretion on how to operate.⁶¹ As the Court in *DeLodder* aptly stated: “Even if all
 12 Recruiters share a common duty to source and screen, it does matter if Recruiters carry out that duty by
 13 using discretion and independent judgment as opposed to serving as mere functionaries, or, similarly, if
 14 Recruiters carry out their duties under general as opposed to specific supervision.” *DeLodder* at *15.

15 Further, while Account Managers may be involved in deciding which candidates to submit to a
 16 customer, many Recruiters testify that their recommendations are accepted most of the time, as Account
 17 Managers trust in the candidates that the Recruiters present and will submit those candidates to TEK’s
 18 customers.⁶² That analysis is inherently not subject to common proof. Simply because the Account
 19 Manager or even the customer has a final say in whether a candidate submitted or begins an assignment
 20 does not mean that recruiters are not utilizing independent discretion and judgment in which candidates

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 22 ⁶¹ See Mendez Decl. ¶¶ 9, 14 “Through my years of experience, I have developed a particular expertise
 23 with positions for software development engineers at tech companies. In order to ensure that I am
 24 successful at my job and can identify the best prospects for specific positions, I have developed specific
 25 technical knowledge so that I can understand and assess the qualifications of the front end engineers that
 26 I place. In my experience, front end engineers have their own language, including around Java script and
 27 React and Angular computing languages used in their work, and I have had to learn how to
 28 communicate in their language as well. . . . Based on my experiences with different clients, over time I
 have developed and compiled screening questions unique to each client to ensure I can locate the most
 qualified candidate for the position. I have to evaluate the candidate’s skill level and importantly
 determine if the candidate is a good fit for the specific client, since each client has different types of
 needs. I do this by, among other things, assessing the candidate’s communications skills, how they
 respond to various social cues, and their overall personality, as well as probing their skill level with
 specific tech tools and their knowledge of certain technologies.”

⁶² Rothermich Decl. ¶¶ 29, 30; McCarty Decl. ¶¶ 14, 15; Mendez Decl. ¶¶ 16, 17; Harvey Decl. ¶ 19;
 Guffy Decl. ¶ 13.

1 they are recommending. *See, e.g., Bucklin v. Am. Zurich Ins. Co.*, 2013 WL 3147019 (C.D. Cal. June
 2 19, 2013), *aff'd* 619 F. App'x 574 (9th Cir. 2015). As the *Bucklin* court described in a case finding
 3 claims adjusters to be exempt:

4 Although plaintiffs have adduced evidence that their supervisors exerted some oversight
 5 over their tasks, it did not eliminate the substantial independence plaintiffs otherwise
 6 enjoyed. To be sure, certain decisions required supervisory approval, including denials
 7 of claims, hiring a private investigator, setting reserves, or entering settlement above
 8 personal authority limits, and referring claims to the subrogation or fraud unit.
 Nevertheless, . . . even where such decision required pre-approval, **plaintiffs were
 expected to offer a reasoned recommendation for the action**, which was accepted the
 vast majority of the time....

9 *Id.* (emphasis added). *See also Maddox v. Continental Casualty Co.*, 2011 WL 6825483 at * 6 (C.D.
 10 Cal. 2011) (adjusters were not misclassified based on supervisory oversight “simply because plaintiff
 11 was required to seek approval from a manager or director when a decision exceeded his underwriting
 12 authority”); *Robinson-Smith v. Gov't Employees Ins. Co.*, 590 F. 3d 886, 894 (D.C. 2010)(freedom from
 13 immediate supervision “does not necessarily imply that the decisions made by the employee must have a
 14 finality that goes with unlimited authority and a complete absence of review”).

15 **2. Reporting to supervisors does not eliminate the exercise of discretion and
 16 independent judgment**

17 Similarly, contrary to Plaintiffs’ assertion, “[t]he fact that an employee’s decision may be subject
 18 to review and that upon occasion the decisions are revised or reversed after review does not mean that
 19 the employee is not exercising discretion and independent judgment....” *Zelasko-Barrett v. Brayton-
 20 Purcell, LLP*, 198 Cal. App. 4th 582, 591 (2011). Indeed, section 541.207(e) states this explicitly:

21 (e) *Final Decisions not necessary.* (1) The term “discretion and independent judgment”
 22 as used in the regulations . . . does not necessarily imply that the decisions made by the
 23 employee must have a finality that goes with unlimited authority and a complete absence
 24 of review. The decisions made as a result of the exercise of discretion and judgment may
 25 consist of recommendations for action rather than the actual taking of action. The fact
 26 that an employee’s decision may be subject to review and that upon occasion the
 27 decisions are revised or reversed after review does not mean that the employee is not
 28 exercising discretion and judgment.

29 In short, the fact that all Recruiters have a supervisor is meaningless. *See, e.g., Smith v. Gov't
 30 Employees Ins. Co.*, 590 F.3d 886, 894-95 (D.C. Cir. 2010) (employees’ exempt status was not defeated
 31 simply because they routinely communicated with supervisors); *Mekhitarian v. Deloitte & Touche
 32 (ICS), LLC*, 2009 WL 6057248, *4 (C.D. Cal. 2009) (“Virtually every employee—no matter how high

1 ranking—is subject to some degree of supervision by a superior. It is the degree of supervision that is
 2 key, and the degree of supervision of class members cannot be determined on common proof because
 3 the evidence indicates that they had significantly different experiences while working for Defendants.”).

4 Plaintiffs’ citation to *Tierno v. Rite Aid Corp.*, 2006 WL 2535056 (C.D. Cal. Feb. 7, 2007) for
 5 the proposition that “standardized hierarchy often shows similar levels of supervision across employees”
 6 is misplaced. In *Tierno*, the employer established extremely specific and rigid policies that left little, if
 7 any, room to exercise discretion or manage. See, *Pedroza v. PetSmart, Inc.*, 2013 WL 1490667, at * 10
 8 (C.D. Cal. Jan. 28, 2013)(“But more importantly, in [Tierno], the plaintiffs sufficient established that the
 9 company policies at issue tightly controlled the universe of duties performed by the employees”);
 10 *Casida v. Sears Holdings Corp.*, 2012 WL 3260423, at *21-22 (E.D. Cal. Aug. 8, 2012) (*Tierno* is
 11 distinguishable because of the companies’ centralized control or authority in almost every aspect of store
 12 operations”; *Perry-Roman v. AIG Ret. Servs., Inc.*, 2010 WL 8697061, at *4 (C.D. Cal. Feb. 24, 2010)
 13 (Stating that *Tierno* was inapplicable because “putative class members [were] subject[ed] to
 14 mechanized, top-down, and uniform supervision with defined sets of tasks and little for flexibility”);
 15 *Wiegele v. FedEx Group Package Sys, Inc.*, 267 F.R.D. 614, 622 (S.D. Cal. 2010) (“However, factual
 16 differences, such as the scope of the relevant policies and the defendant’s close supervision of the
 17 plaintiffs, lead the Court to conclude that it should not follow *Tierno*.”)

18 Plaintiffs’ reliance on *Metrow v. Liberty Mut. Managed Case LLC*, 2017 U.S. Dist. LEXIS
 19 73656 (C.D. Cal. May 1, 2017), fails for the same reasons. In *Metrow* the Court was addressing the
 20 exempt status of nurse care managers. The Court found that predominance under Rule 23(b) could be
 21 found because “all NCMs must perform these tasks chronologically based on a uniform schedule and the
 22 tasks must be completed within a specified time period. Also, every NCMs’ performance of each task is
 23 evaluated based on the same standardized criteria. The record shows that every NCM completes their
 24 assignment based on standardized step-by-step instructions.” *Id* at *29. As set forth above and below,
 25 that is simply not applicable to the facts of this case.

26 Here, the evidence regarding the degree of oversight varies significantly. Some Recruiters
 27 testify that while supervisors were frequently involved in evaluating whether the Recruiters met
 28 underlying production metrics, they were not being supervised regarding how they were evaluating,

1 screening, and selecting candidates for submission.⁶³ Essentially, Recruiters were held to account and
 2 overseen on whether they got results, but not as to **how** those results were achieved. That is the critical
 3 difference that makes common proof in this case impossible on the issue of supervision. Moreover,
 4 even if that were not true, multiple Recruiters testified that they operate independently, and in fact are
 5 subject to little to no supervision, other than to review whether they got the job done.

6 **3. Whether Recruiters meet TEK's reasonable expectations raises
 7 individualized issues**

8 Even if a Recruiter were found not to have performed the job in a way that meets the
 9 administrative exemption, an issue remains as to whether that Recruiter's performance meets TEK's
 10 reasonable expectations. Indeed, courts must "consider whether the employee's practice diverges from
 11 the employer's realistic expectations, whether there was any concrete expression of employer
 12 displeasure over an employee's substandard performance, and whether these expressions were
 13 themselves realistic given the actual overall requirements of the job." *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal.4th 785, 802 (1999). The Recruiter's job descriptions, which identify exempt duties,
 14 supports a realistic expectation that Recruiters primarily engage in exempt duties. To the extent a
 15 Recruiter may claim that he/she has no discretion and judgment due to screening tools or Account
 16 Manager oversight or otherwise, that runs contrary to TEK's reasonable expectations articulated through
 17 policy and management.

19 **4. Plaintiffs' seven form declarations have limited evidentiary value**

20 Plaintiffs' declarations do not support a class-wide finding for Rule 23 certification. *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 949 (9th Cir. 2011) (affirming district court's determination that
 21 plaintiff's declarations and deposition testimony "did not support a class-wide determination").
 22 "[U]nder *Dukes*, for anecdotal evidence to give rise to an inference of a common practice, the evidence
 23 should be representative in number and in geography." *Pedroza*, 2013 WL 1490667, at *8; *citing Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011). Here, however, the seven declarants worked
 24 for a limited period of time for only a few Account Managers (a model that was going away even during
 25 their employment and which now is uncommon), which is not representative of the proposed California
 26
 27

28
 63 Levine Gorelick Decl. ¶¶ 8, 9; Whitman Decl. ¶¶ 9-12.

1 class. In contrast, TEK has submitted 14 declarations that make abundantly clear that the administrative
 2 exemption applied to numerous, if not all Recruiters. The discrepancy by Plaintiffs' evidence and
 3 TEK's evidence warrant denial of certification here.⁶⁴

4 **D. Adjudicating Plaintiffs' Claims On A Class Basis Would Not be Manageable**

5 Plaintiffs have not and cannot describe a coherent trial plan. Plaintiffs make no effort to explain
 6 how this case could be tried with collective proof. They appear to suggest that a trial will be
 7 unnecessary because the Court can ignore *Harris*'s directive to apply the regulations as a whole and can
 8 grant summary judgment as to the "directly related to" prong. But even if this could be done, they make
 9 no mention of what happens if Recruiters meet this prong. There is no collective proof for the other
 10 elements of the exemption and thus the case would have to be decertified. Even if the question of
 11 whether Recruiters' work meets the "directly related to" prong were an appropriate question for
 12 certification, Plaintiffs cannot offer any plan as to how the issues of whether Recruiters customarily and
 13 regularly exercise discretion and judgment could be tried with collective proof.

14 Here, a class action is not a superior means of conducting this litigation because individual
 15 inquiries into the hundreds of class members' assignments, work schedules, and hours would overwhelm
 16 the court and render a class action unmanageable. Plaintiffs offer no method to manage a class action
 17 where the existence, type, and extent of damage varies from person to person and therefore individual
 18 damages issues predominate. As the United States Supreme Court held: "[q]uestions of individual
 19 damage calculations will inevitably overwhelm questions common to the class." *Comcast v. Behrend*,

20 ⁶⁴ See *Garcia v. Sun Pac. Farming Co-op, Inc.*, 359 F. App'x 724, 726 (9th Cir. 2009) (class
 21 certification denied; "the record evidence—in particular, the conflicting employee declarations
 22 submitted by each party—does not establish common wage and hour practices, ... but rather the
 23 '[in]consistent application of the wage and hour laws between and among the [proposed class]'"'); *Hubbs*
 24 *v. Big Lots Stores, Inc.*, 2017 WL 2304754 at *8 (C.D. Cal. May 23, 2017) (class certification denied
 25 based on conflicting evidence of "contrary declarations"); *Chavez v. AmeriGas Propane, Inc.*, 2015 WL
 26 12859721 at *21 (C.D. Cal. Feb. 11, 2015) (class certification denied based on "conflicting testimony");
 27 *Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 507, 527 (E.D. Cal. 2014) (granting decertification
 28 based on "conflicting and contrary evidence submitted by each side"); *Soto v. Castlerock Farming &
 Transp., Inc.*, 2013 WL 6844377, at *17, 19 (E.D. Cal. Dec. 23, 2013) (class certification denied;
 holding that "conflicting testimony poses a significant concern for managing [a] class action" and
 "conflicting evidence . . . defeats a finding of commonality for purposes of class certification;" "In light
 of the dissimilarities and conflicting testimony of putative class members, the Court is unable to find a
 contention 'capable of classwide resolution'"') (internal citations omitted); *Rai v. CVS Caremark Corp.*,
 2013 WL 10178675, at *9 (C.D. Cal. Oct. 11, 2013) (class certification denied based on conflicting
 testimony potential class members; "This competing testimony is insufficient for the Court to find that
 CVS had a common practice or policy . . . , and the Court cannot find that common issues
 predominate.").

1 133 S.Ct. 1426, 1433 (2012) (rejecting Court of Appeals' acceptance of plaintiffs' damages
 2 methodology without analyzing whether that model was "speculative," because "[u]nder that logic, at
 3 the class-certification stage *any* method of measurement is acceptable so long as it can be applied
 4 classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce Rule
 5 23(b)(3)'s predominance requirement to a nullity.")⁶⁵

6 **IV. CONCLUSION**

7 Plaintiffs insist that the exempt status of Recruiters can be determined in one fell swoop. The
 8 record demonstrates otherwise. As the Court made clear in *DeLodder*, "t]he record here makes clear
 9 that this question can only be answered on an individualized basis. The degree of discretion exercised by
 10 Recruiters varies at nearly every step of the recruiting process. The record shows broad diversity in the
 11 discretion exercised by Recruiters at various steps in the recruiting process on an office-by-office,
 12 division-by-division, and Recruiter-by-Recruiter basis. Given that diversity, determining whether a
 13 Recruiter exercised discretion and independent judgment sufficient to satisfy the second condition of the
 14 administrative exemption requires an individualized factual inquiry, and does not lend itself to common
 15 proof on a class-wide basis." *DeLodder* at *13-14. For all the foregoing reasons, Defendant
 16 respectfully requests that Plaintiffs' motion for class certification be denied in its entirety.

17 DATED: November 17, 2023

SEYFARTH SHAW LLP

19 By: /s/ Brian P. Long
 20 Andrew L. Scroggins
 Brian P. Long
 21 Attorneys for Defendant
 TEKSYSTEMS, INC.

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 25 ⁶⁵ Other courts following *Comcast* agree that certification in such instances is only appropriate if "there
 26 is evidence demonstrating the existence of a classwide method of awarding relief that is consistent with
 27 the plaintiffs' theory of liability." *Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, *15 (C.D. Cal. 2013)
 ("As the Supreme Court reemphasized in *Comcast*, in order for...[the] predominance requirement to be
 satisfied, a plaintiff must bring forth a measurement method that can be applied classwide and that ties
 the plaintiff's legal theory to the impact of the defendant's allegedly illegal conduct."). "Otherwise, the
 plaintiffs have not met their burden of introducing evidence showing that common questions
 predominate regarding classwide relief." *Guido*, *15; citing *Comcast*, 133 S.Ct. at 1432 ("The party
 must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b).")